

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 20

In the Matter of:

Whole Foods Market Services, Inc.,	Case Nos.	01-CA-263079
		01-CA-263108
		01-CA-264917
and		01-CA-265183
		01-CA-266440
Savannah Lynn Kinzer, Suverino		01-CA-273840
Frith, Leea Mary Kelly, Ana		04-CA-262738
Belen Del Rio Ramirez, Camille		04-CA-263142
Tucker-Tolbert, Truman Read,		04-CA-264240
Abdulai Barry, Haley Ashley		04-CA-264841
Evans, Cassidy Visco, Justine		05-CA-264906
O'Neill, Sarita Wilson, Lyla		05-CA-266403
Marcella Styles, Yuri London,		10-CA-264875
Shannon Liss-Riordan,		19-CA-263263
Christopher Michno, Kirby		20-CA-264834
Burt, and Kaeleb Rae Candrill,		25-CA-264904
As Individuals.		32-CA-263226
		32-CA-266442

Place: San Francisco, California (via Zoom Videoconference)

Dates: July 14, 2022

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

In the Matter of:

WHOLE FOODS MARKET SERVICES,
INC.,

and

SAVANNAH LYNN KINZER, SUVERINO
FRITH, LEEA MARY KELLY, ANA
BELEN DEL RIO RAMIREZ, CAMILLE
TUCKER-TOLBERT, TRUMAN READ,
ABDULAI BARRY, HALEY ASHLEY
EVANS, CASSIDY VISCO, JUSTINE
O'NEILL, SARITA WILSON, LYL
MARCELLA STYLES, YURI LONDON,
SHANNON LISS-RIORDAN,
CHRISTOPHER MICHNO, KIRBY
BURT, AND KAELEB RAE CANDRILL,
AS INDIVIDUALS

Case Nos.	01-CA-263079
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	25-CA-264904
	32-CA-263226
	32-CA-266442

The above-entitled matter came on for hearing, pursuant to notice, before **ARIEL SOTOLONGO**, Administrative Law Judge, at the National Labor Relations Board, Region 20, 450 Golden Gate Avenue, Suite 3112, San Francisco, CA 94102, on **Thursday, July 14, 2022, 9:10 a.m.**

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I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
Jessica Sims	2207	2223	2231	2232	

E X H I B I T S

<u>EXHIBIT</u>	<u>IDENTIFIED</u>	<u>IN EVIDENCE</u>
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General Counsel:

GC-66	2197	2200
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GC-1 (tttt) through 1 (fffff)	2194	2196
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Respondent:

R-70	2220	2223
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P R O C E E D I N G S

1
2 JUDGE SOTOLONGO: Good morning. This is Judge Sotolongo.
3 We are resuming the hearing in the matter of Whole Foods. I'm
4 not going to read all of the case numbers because it will take
5 half of the day, but this is the Atlanta portion of the
6 hearing.

7 We had previously agreed -- all the parties had agreed to
8 it and had signed a scheduling order to that effect -- that
9 today's hearing was going to be virtual. And the reason for
10 that is that everyone anticipated it was going to be a short
11 hearing, and for reasons of economy and efficiency --
12 efficiency, we all agreed that it would not be -- it would have
13 been unreasonable for us, all of us, to travel to -- to Atlanta
14 for what would amount to be a very short hearing. As it turned
15 out -- as it turns out, I just learned a few minutes ago during
16 an off-the-record discussion that apparently the main witness,
17 if not the only witness, Ms. Wilson, I believe her name is. Is
18 that correct, Mr. Peterson?

19 MR. PETERSON: That's correct, Your Honor.

20 JUDGE SOTOLONGO: Who's one of the alleged discriminatees
21 and Charging Parties in this case. Apparently, she is not
22 available. Now, the General Counsel has informed me that he's
23 going to offer a exhibit into the record and then he's going to
24 rest his case, at least with regard to this portion of the
25 case.

1 Is that correct, Mr. Peterson?

2 MR. PETERSON: That's correct, Your Honor.

3 JUDGE SOTOLONGO: Now, obviously, Respondent has informed
4 me recently that -- well they have -- and -- and my
5 understanding is that this exhibit that the General Counsel's
6 going to proffer is one that was obtained from the Respondent
7 via subpoena. That this -- this is a document that was
8 produced by Respondent pursuant to the General Counsel's
9 subpoena, so there's no issue as to its admissibility or
10 authenticity, excuse me, no issue as to its authenticity. The
11 Respondent has informed me, and I'll let the Respondent address
12 that further, we'll have an objection based on relevance or
13 admissibility. So we'll have -- we'll address that in a minute
14 when -- when -- when that evidence, excuse me, when that
15 evidence, when that exhibit is proffered.

16 Okay. So far, is my summary correct, Mr. Peterson?

17 MR. PETERSON: Yes, Your Honor.

18 JUDGE SOTOLONGO: All right. And let me ask you, Mr.
19 Peterson, because this is something that I'm going to be
20 addressing later on with regards to the hearing scheduled for
21 next week in Washington, DC, because something has come up also
22 regarding -- with regard to -- to that -- to that hearing. Or
23 to that scheduled hearing. You stated -- well, I'll let you --
24 I'll let you make your statement on the record, but basically,
25 you apparently recently learned that Ms. Wilson was either

1 unavailable or -- and/or unwilling to testify at this point.

2 Is that correct?

3 MR. PETERSON: I recently received confirmation of that.

4 Yes, Your Honor.

5 JUDGE SOTOLONGO: Okay, why don't you address that?

6 Tell -- tell us what's -- what's -- what has occurred here.

7 MR. PETERSON: So this is -- yes, so -- so this has been a
8 witness -- I -- I've been mainly going through Charging Party
9 Counsel as far as communications with witnesses, and there's --
10 there has been indication for -- for -- many weeks that this
11 witness was not responding to -- to the Charging Party Counsel.
12 We got permission to try and reach out to the Charging Party,
13 and the witness was also nonresponsive to myself. The -- the
14 Board agent that took -- took the witness' affidavit was able
15 to -- to -- to reach the witness, and the witness indicated
16 that they did not want to participate in -- in the hearing
17 going further, they had complicated personal situations that
18 were taking priority. And so we had hoped -- we had hoped that
19 perhaps a change of heart might have happened, but -- but the
20 witness has not appeared.

21 When that became -- when that became clear, I notified
22 Charging -- sorry, Whole Foods -- Respondent's Counsel, that we
23 did not anticipate that this witness would be appearing in the
24 hopes that they would have their witnesses ready to go sooner
25 than later, if -- if -- if any.

1 JUDGE SOTOLONGO: Well, okay. So I guess the question
2 then becomes -- of course I haven't seen the exhibit you're
3 going to offer yet, but in light of this development -- and I
4 guess the first question that pops into my head is, and I --
5 and I -- and I guess I'm addressing you, Mr. Brown, or the
6 Respondent. In light of this development, is -- is there any
7 need for the employer to put on its evidence or its witnesses
8 for today's hearing?

9 MR. BROWN: It's un -- unclear at this moment, Your Honor.
10 It depends, I suppose, if this exhibit is admitted into
11 evidence, which doesn't have any -- any context. We may -- we
12 may call one witness for 15 minutes and call it a day.

13 JUDGE SOTOLONGO: Okay. All right. Let's do this. Let's
14 do this. Let's introduce -- proffer -- Mr. Peterson, I want
15 you to proffer the exhibits. Hopefully, we'll be able to see
16 it on the screen.

17 And then we can discuss its admissibility. And based upon
18 my ruling -- you know -- you've -- you've heard me rule in
19 these matters. My -- my preference, and this is pursuant to
20 what the Board has informed its Judges, that to admit, in case
21 of doubt, to admit exhibits. And then to just give it its
22 proper weight. That way the matter is before the Board, and --
23 and -- and then -- that -- it prevents having to then reopen
24 the record to admit something, so I will likely admit it. I
25 haven't seen it yet. And -- and then I will give it whatever

1 weight I think is appropriate.

2 And obviously, that means, Mr. Brown, that if you have to
3 put on your witness, it's going to be -- if I understood you
4 correctly it's going to be a 15, 20-minute witness, then I
5 think we should do that, and not -- in order not to keep
6 this -- this individual waiting. And then we can address the
7 other issues that are -- that are before us, mainly the issue
8 having to do with next week's hearing that was changed to
9 Washington, DC, and then, of course, the motion to sever that
10 you -- you made, the Respondent made, and that was responded to
11 by the General Counsel last night.

12 So Mr. Peterson, go ahead and -- and proffer your exhibit.
13 Hopefully, we can get it on the screen so I can take a look at
14 it. Go ahead.

15 MR. PETERSON: And -- and Your Honor, I also want to
16 note -- we do have a supplement to the formal documents to --
17 to offer. Should I do that first or save that for --

18 JUDGE SOTOLONGO: Yeah, might as well. Why don't do that
19 first?

20 MR. PETERSON: Okay. And as -- as -- as -- as you know,
21 Your Honor, before -- before offering additional exhibits as
22 we've previously discussed, I wish to state the General
23 Counsel's intention to offer and receive evidence -- or offer
24 and receive exhibits -- in electronic form where practicable,
25 and with respect to each exhibit offered or received in

1 electronic form, the exhibit is contemplated for offering or
2 receipt in electronic form, and that there is no request to
3 have electronic documents scanned or otherwise formatted.
4 That's -- that's a note for the court reporter, primarily.

5 Additionally, the -- this -- this case has been -- been
6 tried in different parts of the country, sometimes virtually,
7 sometimes in person, and there's been some -- some overlap
8 of -- of exhibits and volumes that we're working with the court
9 reporter on. But I wish to state that for -- for -- for
10 today's hearing, this should start with Volume 13 on page 2185.

11 JUDGE SOTOLONGO: Okay. Duly noted.

12 MR. PETERSON: And Your Honor, at this point I wish to
13 offer as a third supplement to the formal papers that have
14 previously been received into evidence as General Counsel's
15 Exhibit 1: Exhibits 1(tttt), through 1(fffff), inclusive;
16 Exhibit 1(fffff) being an index and description of the
17 supplemental exhibits. I will upload that document into
18 SharePoint and I have shared -- I -- I have shared the exhibit
19 with counsel and the court reporter.

20 JUDGE SOTOLONGO: Very well. What -- just -- since I -- I
21 don't have those on my screen, what -- very briefly, what are
22 those formal documents? What exactly are those formal
23 documents that you are -- amended or supplemental or formal
24 documents that you are offering?

25 MR. PETERSON: Sure, Your Honor. Would you like me to

1 share the screen or just give you a -- a summary?

2 JUDGE SOTOLONGO: Why don't you go -- why don't you go
3 ahead and share -- go ahead and share the screen.

4 MR. PETERSON: So these include the Charging Party's
5 Motion to Maintain Highly Confidential Designation and Seal
6 Highly Confidential Exhibits, the Order to Show Cause regarding
7 that Motion, Respondent's Motion to Preclude Expert Testimony,
8 Respondent's Opposition to Charging Party's Motion to Maintain
9 the Highly Confidential Designation, Corrected Order to Show
10 Cause regarding the Respondent's Motion to Preclude Expert
11 Testimony, Charging Party's Motion for Leave regarding the
12 Highly Confidential Designation Motion, the General Counsel's
13 Response to the Order to Show Cause regarding the Motion to
14 Preclude Expert Testimony, certificates of service, the Order
15 Denying the Motion to Maintain the Highly Confidential
16 Designation, Respondent's reply to General Counsel's Response
17 to the Order to Show Cause regarding the Motion to Preclude
18 Expert Testimony, the Order Denying the Motion to Exclude
19 Expert Testimony, the amended Zoom hearing invitation with
20 instructions and protocols, and then the -- and then the -- the
21 Index.

22 JUDGE SOTOLONGO: All right. So basically it's -- okay --
23 I can see now. So basically it's just basically adding all the
24 old documents, orders, motions, and so forth that had issued
25 since the last time we amended the formal -- the formal papers.

1 Is that correct?

2 MR. PETERSON: That is correct up to that date. There
3 are -- there are additional formal documents that have been
4 exchanged since that I'll -- I'll -- I'll move in -- in
5 later --

6 JUDGE SOTOLONGO: Very -- very well. Very well. All
7 right. Any -- any objections to the admission of General
8 Counsel's -- I guess it's 1(tttt) through 1(fffff). Is that
9 correct?

10 MR. PETERSON: Yes. 1(fffff).

11 JUDGE SOTOLONGO: Quintuple f.

12 MR. FERRELL: No objection, Judge.

13 JUDGE SOTOLONGO: All right. These documents are
14 admitted.

15 **(General Counsel Exhibit Number 1(tttt) through 1(fffff)**
16 **Received into Evidence)**

17 JUDGE SOTOLONGO: All right. Mr. Peterson?

18 MR. PETERSON: Yes, Your Honor. As -- as -- as you noted
19 on the record, the -- the General Counsel does not have any --
20 any witnesses to offer for this Atlanta portion of the -- of
21 the case, but would move -- move to offer a series of emails
22 that Respondent produced pursuant to subpoena between --
23 between managers in the Atlanta region describing a -- a -- a
24 meeting with Charging Party Wilson where she was instructed to
25 remove a Black Lives Matter T-shirt as a -- a violation of --

1 of dress code or -- or be sent home and she opted to go home.
2 And it's -- oh, sorry -- can -- may I show the screen, Your
3 Honor?

4 JUDGE SOTOLONGO: Yes. Go ahead.

5 MR. PETERSON: Yeah. So this has been marked as General
6 Counsel's Exhibit 66.

7 JUDGE SOTOLONGO: Okay. How would you describe this
8 document? This will be an email exchange. Is that correct?

9 MR. PETERSON: Yes.

10 JUDGE SOTOLONGO: Between whom and whom?

11 MR. PETERSON: Between a number of Respondent's managers
12 in the -- in the Atlanta store and responsible to the Atlanta
13 store -- Claire -- Claire Banks being -- being one of them
14 who's an admitted -- admitted supervisor, as is --

15 JUDGE SOTOLONGO: Okay. And this is -- and this is
16 downloaded in SharePoint? Is that correct?

17 MR. PETERSON: And Jessica Sims is the other -- the other
18 admitted supervisor. It's not there yet. I was -- I -- I --
19 I -- I've been waiting to -- for -- for the exhibits to be
20 admitted or rejected before putting them into the SharePoint
21 file.

22 JUDGE SOTOLONGO: All right. So you're offering these --
23 this document, which as I understand is an ex -- email exchange
24 between managers, Respondent's managers. Is that correct?

25 MR. PETERSON: That's correct.

1 JUDGE SOTOLONGO: And it has to do with Ms. Wilson?

2 MR. PETERSON: Yes, it does.

3 JUDGE SOTOLONGO: All right. And this was produced --
4 this -- these are documents -- or this is a document that was
5 produced by Respondent pursuant to General Counsel's subpoena
6 duces tecum. Is that correct?

7 MR. PETERSON: That's correct.

8 JUDGE SOTOLONGO: All right. Mr. Brown?

9 MR. BROWN: Yeah. Thank you. Mr. Peterson is -- this is
10 GC -- is this marked for identification as 66, or --

11 MR. PETERSON: It is. Correct.

12 MR. BROWN: Or what?

13 MR. PETERSON: 66.

14 MR. BROWN: Yeah. So Mr. -- Mr. Peterson is -- is correct
15 that -- that Whole Foods Markets stipulated to the
16 authenticity -- authenticity of -- of this email chain that's
17 been marked for identification as GC 66. And we -- we agree
18 that the email chain was produced by the company's -- part of
19 its response to the subpoena production.

20 However, we -- we do object on -- on hearsay grounds for
21 the following reason: Unlike the other examples, Your Honor,
22 that -- that you -- you referenced, where you had taken some
23 documents in -- into evidence on consent of both parties, I --
24 I would add -- for the -- the limited weight or the weight that
25 you deem appropriate. None of those were Charging Party's.

1 This isn't just the named discriminatee, Your Honor. This is
2 the -- the Charging Party, the only Charging Party in all of
3 Atlanta. The document before you, and the reference to Jessica
4 Sims as the store's support associate team leader, which is the
5 page that -- that you're looking at right there. It is a -- it
6 is a summary of the meeting that took place and a summary of
7 what the Charging Party, who's not here to be cross-examined,
8 said at a meeting. That is hearsay. And we are not able to
9 cross-examine the Charging Party for the statement that is
10 being asked to be admitted for the truth of the matter.

11 This is a summary of -- of a conversation, putting words
12 in the Charging Party's mouth, and now being asked to be put
13 into evidence for the truth of the matter. We don't think
14 that's appropriate, and we -- we don't think that you should
15 accept this document for any reason in the absence of Ms.
16 Wilson being available to testify and subject to cross-
17 examination.

18 MR. PETERSON: Your Honor, may I be heard?

19 JUDGE SOTOLONGO: Go ahead.

20 MR. PETERSON: Yeah. So -- yeah -- so these -- so the --
21 this is a -- this -- this document falls under both the -- the
22 hearsay exception as a -- a business record and also a
23 exclusion from the hearsay rule as an admission of -- an
24 admission by a party of opponent. And so on -- on those
25 grounds, the -- the hearsay rule should -- should not preclude

1 the admission of the testimony -- or of the document.

2 MR. BROWN: We -- we do not agree. This is not a business
3 record. This is an email summarizing what the Charging Party
4 allegedly said and did and introduced by counsel for the
5 General Counsel for the truth of the matter without the ability
6 to cross-examine the party. And it is not the statement of
7 a -- of a party opponent. This is the statement summarizing
8 the statement of the actual Charging Party.

9 JUDGE SOTOLONGO: Okay. I don't have -- you know, I don't
10 have the benefit of having the printed document before me as,
11 you know, when we've been meeting in person, you've all been
12 kind enough to give me a copy of the -- a hard copy of the
13 document being introduced. I have not yet -- until this gets
14 down -- downloaded -- until this gets downloaded into
15 SharePoint, I haven't -- I don't have -- we don't have the
16 ability to print it out and -- and take a look at it. And
17 I'm -- I'm old school. I like to look at things right in front
18 of me, a -- a piece of paper.

19 So I will make a preliminary finding that -- I'm -- I'm
20 going to admit it on a provisional basis, pending my ability to
21 review this. And -- and I'll make a final ruling on this. But
22 I will make -- I will -- I will admit it conditionally.

23 **(General Counsel Exhibit Number 66 Received into Evidence)**

24 JUDGE SOTOLONGO: I think that to the extent that -- that
25 this document reflects statements made by manager of the

1 Company, it is an admission and therefore not hearsay under the
2 federal rules. While -- while it is true that obviously they
3 are referring to things that were said by Ms. Wilson,
4 apparently. I -- and I don't know for a fact, I'm surmising
5 from what has been said here. It is true that Respondent
6 doesn't have the -- the -- the -- in -- in -- in light of Ms.
7 Wilson's absence, Respondent doesn't have the capacity or the
8 ability to cross-examine her.

9 But here we don't have -- the person who's speaking in
10 those documents, now, Ms. Wilson, would rather that they -- the
11 manager in question. So I will take a closer look at this once
12 I have a copy -- hard copy of this, and I'll make my final
13 ruling. So I'm going to admit it provisionally. Again,
14 whether I will admit it ultimately, formally, and what weight
15 if any, I give it, should I admit it, that is something that I
16 will make a decision later.

17 Now, that -- that means, Mr. Brown, obviously if you
18 believe -- if you -- and -- and if -- under the circumstances,
19 now, for reasons -- reasons of efficiency, you believe you
20 should put a witness or witnesses on the stand now to either
21 explain or to address the contents of -- of this document,
22 you're certainly welcome and -- and able to do so. I leave
23 that up to you.

24 MR. BROWN: Yeah --

25 JUDGE SOTOLONGO: Again --

1 MR. BROWN: Your -- Your Honor, I appreciate that. I -- I
2 think -- I guess before I say anything more, is -- is the -- is
3 the -- is counsel for the General Counsel resting as it relates
4 to Atlanta?

5 JUDGE SOTOLONGO: That's my understanding, right, Mr.
6 Peterson? You're -- you -- you're putting this document in the
7 record and you're resting your -- that's not a portion of your
8 case; is that correct?

9 Mr. Peterson, I think you're froze. At least on my -- my
10 screen.

11 MR. BROWN: I thought he was just still, but yeah.

12 MS. SCHAEFER: He was very still.

13 JUDGE SOTOLONGO: I thought he was engaged in deep
14 thought.

15 Mr. Peterson, you're back with us. All right, sir, I
16 don't know --

17 MR. PETERSON: I am, yes, yes, I am.

18 JUDGE SOTOLONGO: -- if you heard me, but --

19 MR. PETERSON: I -- I -- I heard the -- yeah, I heard you
20 off -- you were going to receive -- you were receiving it
21 provisionally, and -- and -- and that -- that was the -- that
22 was when I was cut off.

23 JUDGE SOTOLONGO: Okay. So then I told Mr. -- I informed
24 Mr. Brown that in light -- in light of my ruling that I'm
25 admitting this provisionally, (audio interference), additional

1 time to review it, once I -- I -- I can see it, the document in
2 front of me, that I'm allowing him -- obviously it's up to him
3 to make -- to make this call, but if he wishes to put a witness
4 or witnesses to address the contents of this -- of this
5 document, that he's free to do so and welcome to do so.

6 He then said that he would do that, but he wanted to know,
7 first of all, whether this means that you're resting your
8 Atlanta -- Atlanta portion of your case with the piece. In
9 other words, you're -- you're putting this document on the
10 record, you're offering -- you're proffering this document on
11 the record, and -- and -- and then -- and you're resting your
12 Atlanta portion of the case. Is that correct?

13 MR. PETERSON: That's correct.

14 JUDGE SOTOLONGO: Mr. Brown?

15 MR. BROWN: Your Honor, I would -- I would ask for the
16 Jencks material. The -- Sarita Wilson, the Charging Party, did
17 not appear today, but summaries of what she allegedly said have
18 been put into evidence. I understand she provided an affidavit
19 to -- to counsel for the General Counsel, and they all have the
20 benefit of -- of her affidavit if they cross-examine my one
21 witness. And I -- I believe I'm entitled to understand what it
22 is that Ms. Wilson represented to -- to the counsel.

23 MR. PETERSON: Well, the -- the Jencks rule is -- is a
24 very limited rule of -- of -- of -- of -- that allows for
25 the -- the sharing of these confidential documents for the

1 purpose of cross-examination. And in this case, there is no
2 witness to -- that has testified that could be subject to
3 cross-examination, and -- and therefore falls outside of the --
4 the Jencks rule.

5 JUDGE SOTOLONGO: I -- I agree. I don't think in these
6 circumstances a -- a Jencks is appropriate. Obviously, General
7 Counsel's case stands or fall based on the evidence that he has
8 sought to introduce here, namely the -- the document present in
9 General Counsel 66. I mean again, assuming that I admit it,
10 and -- and assuming that I give it some kind of weight, his
11 case will stand or fall -- at least the Atlanta portion of the
12 case, I -- I should say, will stand and fall based on the
13 evidence we have now. And obviously in lieu of the fact that
14 Ms. Wilson is not testifying, that is going to certainly, you
15 know, have an impact on -- on my eventual ruling and my
16 eventual decision. But -- but -- so I leave it up to you, Mr.
17 Brown, to -- then to proceed accordingly.

18 MR. BROWN: Yeah, we -- we will call our -- our witness,
19 Jessica Sims. She's next door, and I'm going to have her log
20 into the Zoom now --

21 JUDGE SOTOLONGO: Okay. You need a --

22 MR. BROWN: -- if that's okay, Your Honor.

23 JUDGE SOTOLONGO: You need a -- you need a few minutes?

24 MR. BROWN: Yeah, just -- just a -- a couple minutes.

25 And -- and Your Honor, if -- if I could prevail upon you to

1 take those two minutes to read Exhibit 66, I think that may be
2 helpful.

3 JUDGE SOTOLONGO: I -- I'm not sure. Has it been
4 downloaded yet? I'm going to see if I can download it.

5 MR. BROWN: Well, maybe Matt could email it to you. Mr.
6 Peterson can --

7 JUDGE SOTOLONGO: Yes, actually, can you -- why don't you
8 do that, Mr. Brown? Why don't you email it to me, and I'll
9 print it out, and -- and hopefully -- if we need to take ten
10 minutes, we'll do so. But why don't you do that? I would
11 appreciate it.

12 MR. BROWN: I -- I would appreciate it.

13 Matt, can you send that to the judge?

14 MR. PETERSON: Yes, certainly. I -- I just put it into
15 the chat. I -- I don't know if that solves the -- the problem.
16 I can email it as well.

17 JUDGE SOTOLONGO: Yeah, why don't you -- why don't you
18 email it to me? I think that's probably the -- that -- better.

19 MR. PETERSON: Okay.

20 MR. BROWN: Your Honor, I think I'll just need ten minutes
21 to get her together here.

22 JUDGE SOTOLONGO: Okay, let's -- let's -- let's go off the
23 record for ten minutes, and that will give me a chance to -- to
24 read the exhibit. So let's go off the record for ten minutes.

25 (Off the record at 9:37 a.m.)

1 JUDGE SOTOLONGO: All right, we're back on the record.

2 We're back on the record. Mr. Brown, I think Ms. -- Ms. Sims
3 is in the waiting room. Could you please allow her in?

4 MR. BROWN: Yes. Your Honor, Ms. -- Ms. Sims is actually
5 on right now.

6 JUDGE SOTOLONGO: Okay, very well. I see her now, yes.

7 MR. BROWN: And Whole Foods Market calls Jessica Sims to
8 the stand.

9 JUDGE SOTOLONGO: Hold on. Let's -- let's wait. We still
10 have a few people that need to come on board. Ms. Doherty is
11 still -- okay, where -- you're coming on board now.

12 MS. DOHERTY: I just kind -- do you want us to turn --
13 turn our cameras off if we're not speaking?

14 JUDGE SOTOLONGO: Right, anybody who is not speaking,
15 please turn your -- your -- mute your -- your microphones,
16 please.

17 All right, Ms. Sims, would you please raise your right
18 hand?

19 Whereupon,

20 **JESSICA SIMS**

21 having been duly sworn, was called as a witness herein and was
22 examined and testified, telephonically as follows:

23 JUDGE SOTOLONGO: Thank you. Please state your -- please
24 spell your -- your full name for us, for the record, and give
25 us your address.

1 THE WITNESS: Jessica Sims, J-E-S-S-I-C-A S-I-M-S. You
2 said my address?

3 JUDGE SOTOLONGO: Yes.

4 MR. BROWN: Your --

5 JUDGE SOTOLONGO: Your business address will suffice.

6 THE WITNESS: I'm sorry?

7 JUDGE SOTOLONGO: Your business address will suffice.

8 THE WITNESS: Okay. It is 1555 North Decatur Road. That
9 is in Decatur, Georgia.

10 JUDGE SOTOLONGO: All right, thank you very much.

11 Mr. Brown, please proceed.

12 MR. BROWN: Thank you, Your Honor.

13 **DIRECT EXAMINATION**

14 Q BY MR. BROWN: Good morning, Ms. Sims. Who is your
15 employer?

16 A Whole Foods Market.

17 Q And how long have you been employed by Whole Foods Market?

18 A 15 years.

19 Q Okay. And very, very briefly, what positions have you
20 held with the company and -- and at what locations?

21 A I was at Sandy Springs. I was a cashier, cash office team
22 member, booth team member, team mentor, and supervisor.

23 Briarcliff, I was a supervisor. From Briarcliff in Midtown
24 Atlanta, I was a supervisor. From Midtown Atlanta, I was at
25 Ponce de Leon as associate team leader. And I am currently at



1 the Decatur location as associate team leader.

2 Q All of the stores that you've worked in, have they been in
3 the Atlanta Metro area?

4 A Yes, they have.

5 Q Okay, and I think you said your -- your current title is
6 associate team leader; is that correct?

7 A Yes.

8 Q Okay. You mentioned the Ponce de Leon store, is that
9 right?

10 A Yes.

11 Q Okay. And is that in Atlanta as well?

12 A Yes.

13 Q Okay. And is it referred to sometimes as Ponce?

14 A Yes.

15 Q Okay. Did you work -- or when did you work at the Ponce
16 Whole Foods Market store?

17 A From May of 2020 to March of this year, 2022.

18 Q Okay. In May of 2020 and through the entirety of 2020,
19 who was the store team leader at the Ponce Whole Foods Market
20 store?

21 A Claire Banks (phonetic throughout).

22 Q Okay. And who were the associate store team leaders in
23 the summer of 2020 and through 2020 at the Ponce store if you
24 can remember?

25 A Yes, Tidiane Ba, also known as TJ. Michael Hold (phonetic



1 throughout), and the third one, it was one of two people.

2 Either Edgar Padillo, or Yamadina Sarah (phonetic throughout).

3 'Cause they switched out, I just don't know when.

4 Q Okay. And -- and Tidiane or TJ Ba, is that T-I-D-I-A-N-E?

5 A Yes.

6 Q And last name Ba, B-A?

7 A Yes.

8 Q Okay. And as an associate team leader in the Ponce store
9 in the summer or beginning of May of 2020, what team were you
10 part of?

11 A Store support.

12 Q Okay. And what does store support include? What -- what
13 ti -- titles, or what types of positions are included in store
14 support?

15 A Store support has your cashiers. Cashier assistants, if
16 we do hire those. Sanitation, SSS, supervisors, and then as
17 associate team leader, and then as a team leader for the
18 department.

19 Q Okay. And "SSS", is that for tags and signs that are made
20 in the store?

21 A Yes, it is.

22 Q Okay. And who was the team leader of the store support
23 team in the summer of 2020?

24 A Eryn Dennis.

25 Q And that's E-R-Y-N D-E-N-N-I-S, correct?

1 A Yes.

2 Q Okay. And was there another associate team leader in
3 store support at that time?

4 A Yes, there was.

5 Q And who was that?

6 A Ronald Daniels.

7 Q Do you know who Sarita Wilson is?

8 A Yes.

9 Q Okay. And did Ms. Wilson work at the Ponce store in the
10 summer of 2020?

11 A Yes.

12 Q Okay. And what position did she hold?

13 A Cashier.

14 Q Okay. So she was a -- she was a team member in store
15 support working as a cashier; is that fair to say?

16 A Yes.

17 Q Okay. Did Ms. Wilson go by -- by another name other than
18 Sarita Wilson?

19 A Yes.

20 Q What was the other name she used?

21 A Justice.

22 Q So was she known to you as Justice Wilson?

23 A Yes.

24 Q In all your years working at Whole Foods, were you
25 generally familiar with the dress code?

1 A Yes.

2 Q Okay. And were you familiar with the dress code in place
3 in the summer of 2020?

4 A Yes.

5 Q Okay. Is that the same dress code that had been in place
6 for a number of years?

7 A Yes.

8 Q Okay. Was there anything new about the dress code in 2020
9 in view of the global pandemic?

10 A Yes.

11 Q What was new?

12 A We were required to wear masks.

13 Q Okay. And do you have an understanding of whether the
14 masks were subject to the dress code as well?

15 A In the beginning, yes.

16 Q Okay.

17 A I'm sorry, I said that wrong. In the beginning, we did
18 not have any wording on the proper mask protocols.

19 Q And then at some point was there a standard operating
20 procedure issued since they --

21 A Yes.

22 Q -- guided this -- okay. With regard to the dress code, do
23 you recall having a discussion with team members and team
24 leadership in June of 2020 about the dress code?

25 A Yes.

1 Q Okay. And can you tell the Judge, uh, about that, please?

2 A Yes. We just had a refresher on the dress code that was
3 already in the Gig Book. We tried to sit down with team
4 members either as a little group or just individually, just to
5 reiterate the policy that was already in place when it came to
6 the dress code.

7 Q Now, you said it was late May or early June of 2020, do I
8 have that right?

9 A Yes.

10 Q Okay. And why was that? Do you have an understanding of
11 why it was that you were giving a refresher to your team
12 members at that time?

13 A Be -- yes.

14 Q What was the reason?

15 A We was just going over the policy due to a lot of the
16 protesting that was going on. And Atlanta was getting
17 protested pretty highly during that time. So we just wanted to
18 make sure that everybody understood to make sure that you were
19 in dress code, so it doesn't cause any political interactions
20 amongst customers or, you know, amongst ourselves.

21 Q Okay. Now, I'm going to get to this July 24th meeting
22 which we'll talk about in a minute. But at any time other than
23 with Ms. Wilson, did you ever see any other team member wear
24 any Black Lives Matter messaging on any article of clothing, a
25 mask, anywhere, while working at the store?

1 A Not to my recollection, no.

2 MR. BROWN: I want to call your attention to July 24th.

3 And in so doing, what I would like to do is show you what has

4 been marked for identification and tentatively admitted --

5 as I understand it, Your Honor --

6 as General Counsel's Exhibit 66.

7 Did I fairly say that, Judge?

8 JUDGE SOTOLONGO: Yes.

9 MR. BROWN: Okay.

10 And I would like to turn to the very last page of this

11 five-page document. And I'm showing you the last page, which

12 bears in the lower right -- right corner, you'll see it bears

13 Bates number WFM 667, and it's page 5, of the -- of General

14 Counsel's Exhibit 66.

15 Q BY MR. BROWN: Do you see what is before you, Ms. Sims?

16 A Yes.

17 Q Okay. Calling your attention to the email that -- this

18 says, from Jessica Sims, dated July 24th, 2020, to Claire

19 Banks. And subject is Justice. Do you see that?

20 A Yes.

21 Q Okay. Is this an email that you sent to your store team

22 leader, Claire Banks, on July 24th, 2020?

23 A Yes, it is.

24 Q And the subject is Justice. Can you tell me what -- were

25 you talking about the law, or were you talking about Ms. -- Ms.

1 Wilson?

2 A I was talking about Ms. Wilson.

3 Q Okay. In this email, you write that -- you say, "This
4 morning, Ms. Claire and myself were serving Justice for
5 correctives." Do you see that?

6 A Yes.

7 Q Okay. Who was present in the morning at this meeting with
8 Jessica Sims other than yourself?

9 A So it was myself, it was Claire Banks, Justice Wilson, and
10 I believe TJ might have been in the office as well.

11 Q And it says, serving Justice her correctives. What did
12 you mean when you wrote that?

13 A Corrective actions. She was getting written up for two
14 violations.

15 Q Do you remember what the violations were?

16 A Yes. One was an attendance violation, and the other was a
17 performance -- behavior violation, which is a bi -- performance
18 violation.

19 Q Okay. And did that performance violation relate to her
20 inappropriate interactions with a customer?

21 A Yes.

22 Q Okay. And that was -- was that the reason for the
23 meeting?

24 A Both of those were, yes.

25 Q Okay. When Ms. Justice was served the two corrective

1 actions, did she object or complain or say they weren't fair,
2 or did she agree to them? What was her response to the
3 corrective actions?

4 A No, I do believe she signed them willingly.

5 Q Then you write in your email, "Claire informed her that
6 she couldn't wear her BLM T-shirt and offered to get her
7 another shirt to wear." Do you see that?

8 A Yes.

9 Q Okay. What is it that you recall more particularly about
10 that interaction? What did Claire say, and -- about the BLM
11 shirt?

12 A Claire just let her know that the shirt that she was
13 wearing was out of dress code, and she will go get her a shirt
14 out of the PBS office, or human resources office.

15 Q Okay. And when you say BLM -- when you wrote the words
16 BLM, what does BLM stand for?

17 A Black Lives Matter.

18 Q Okay. And I think you said in the PBS or human resources
19 office, were there extra shirts there?

20 A Usually, yes. If there's any extra shirts.

21 Q Okay. You then write that she -- I assume you mean Ms.
22 Wilson -- became emotional. Do you see that?

23 A Yes.

24 Q Okay. What did you mean when you wrote that? What do you
25 recall, how did she become emotional?

1 A She started crying.

2 Q Okay. You then write that, "I told her, this is for any
3 shirt that isn't a Whole Foods branded shirt or vendor shirt,
4 and that the dress code policy has recently been revisited." Do
5 you see where you wrote that?

6 A Yes.

7 Q Can you elaborate on that? What do you recall if anything
8 about what you told Ms. Wilson, and why?

9 A Just let her -- Ms. Wilson know that we're not, you know,
10 picking on her, it has nothing to do with the shirt, we're not
11 singling you out because of the type of shirt you have on, but
12 this would go for any shirt that is not Whole Foods or a
13 vendor-approved shirt.

14 Q Okay. And then I think you -- you wrote -- yeah, you
15 wrote "that the dress policy has recently been revisited." Is
16 that the refresher --

17 A Yes.

18 Q -- that you were just testifying about?

19 A Yes, it is.

20 Q Okay. At that point, you write, "She then stated she
21 needed to step away to call her wife because she doesn't know
22 if this is the company she wanted to continue to work for."
23 What, if anything, do you recall about that?

24 A She did say she needed to step out and call her wife. And
25 she stepped out, called her wife, and then she came back.

1 Q Okay. Now, before she came back, or as she stepped out,
2 you write -- you wrote, "Claire asked her to come back, or step
3 back in the office, so she isn't upset on the floor, and she
4 can say how she felt." Do you see that?

5 A Yes.

6 Q So is the -- do I understand she stepped out and then
7 Claire brought her back in?

8 A Yes.

9 Q Okay. At that point you write, "She began to get upset
10 and raise her voice about how she felt about not being able to
11 wear her shirt or a business shirt, and how she is personally
12 affected by the movement." Do you see that, that's what you
13 wrote?

14 A Yes.

15 Q Okay. When you wrote -- well, what do you remember her
16 saying -- I know this a summary. What do you remember in
17 particular Ms. Wilson saying at that point?

18 A She -- she was crying. Voice very high, yet -- almost
19 yelling -- pretty much yelling. She said that we don't care.
20 She said Oscar Grant is her friend. She went into (b) (6), (b) (7)(C)

21 (b) (6), (b) (7)(C), and she
22 stated that the movement means a lot to her.

23 Q Okay. When -- and -- and just so I -- just for the
24 record, when she referenced that she was -- that -- Oscar
25 Grant, what did she say about Oscar Grant?

1 A That it was her -- that he was her friend.

2 Q And Oscar Grant is the 22-year-old African American who
3 ki -- was killed in 2009 by the BART Police; is that right?

4 A Yes.

5 Q Okay. And with regard to her saying that the -- the
6 movement was important, what movement did you understand her to
7 be referencing?

8 A The Black Lives Ma -- the Black Lives Matter movement.

9 Q And when she said that the Black Lives Matter movement was
10 important to her, what did you understand she was referring to
11 as the Black Lives Matter movement?

12 A She was standing up for all of the Black and Brown men and
13 women that was senselessly being killed at the hands of law
14 enforcement.

15 Q What race is Ms. Wilson?

16 A She's African American.

17 Q Okay. And what is your race, Ms. Sims?

18 A African American.

19 Q Were you aware of the murder of George Floyd in May of
20 2020?

21 A Yes, I was.

22 Q And were you aware of the Black Lives Matter protests that
23 followed Mr. Floyd's murder including in and around Atlanta?

24 A Yes.

25 Q And were you aware of the Black Lives Matter movement at



1 that time in May, June, and July of 2020?

2 A Yes.

3 Q Okay. And what did you understand the Black Lives Matter
4 movement to be about?

5 A Same statement for Justice. Stand up for all of our Black
6 and Brown men and women that were being killed by the police
7 officers.

8 Q Okay. I want to refer you back to the exhibit. After she
9 made that statement, you wrote, "She then leaves to go to the
10 restroom and call her wife. When she returned, she stated she
11 wasn't going to change her shirt, and Claire very politely
12 asked her to go home for the day, and we will follow up with
13 her." Do you see that?

14 A Yes.

15 Q What do you remember specifically, if anything more, about
16 that exchange between the two of them?

17 A She came back in, she stated -- she stated that she wanted
18 to take a personal day. And Claire let her know, you can go
19 home, and you will be paid for, you know, the remainder of the
20 day.

21 Q Did -- so Ms. Wilson was paid -- paid for the day. Do I
22 have that right?

23 A Yes.

24 Q Okay. And was she disciplined in any way for leaving that
25 day because she wouldn't comply with the dress code?

1 A No.

2 Q Did she receive any attendance points?

3 A No.

4 JUDGE SOTOLONGO: Okay. I'd like to show you what we're
5 going to mark for identification as Respondent's Exhibit 69,
6 which is Ms. Wilson's resignation letter.

7 THE WITNESS: Okay.

8 JUDGE SOTOLONGO: All right, Mr. -- just for clarity,
9 Mr. -- Mr. Brown, my -- my record indicates you had previously
10 offered but withdrawn a 69, some sort of policy platform. You
11 know, just to -- to make sure there's any -- there's no
12 misunderstanding, why don't you mark this -- can you mark this
13 as 70?

14 MR. BROWN: Yes, Your Honor, we'll mark this as 70. I
15 think we pre-marked it as 69. But what we'll do is -- as we've
16 done in the past, we'll -- we'll upload this or download it,
17 whatever the right word is, later today, with the right exhibit
18 number.

19 **(Respondent Exhibit Number 70 Marked for Identification)**

20 JUDGE SOTOLONGO: Very well, duly noted. Just -- it's
21 just to make sure there's no confusion of the record.

22 MR. BROWN: Okay.

23 Q BY MR. BROWN: So I'm showing you, Ms. Sims, a multi-page
24 document that has been marked for identification as
25 Respondent's Exhibit 70. And it be -- it bears Bates numbers,

1 Sarita Wilson -- I'm sorry. Something to 16, what is it? What
2 is the first page, please? Sarita Wilson 1-2, 12 through 16.

3 MR. BROWN: And Your Honor, these were documents produced
4 by Ms. Wilson in response to our subpoena.

5 Q BY MR. BROWN: Ms. Sims, I'm looking at the first page
6 of -- of this document. Can you tell me what this is?

7 A This is her letter of resignation.

8 Q Okay. Is this -- this is Justice Wilson's email to you on
9 August 17th, 2020; is that right?

10 A Yes, it is.

11 Q And the subject matter is "Letter of Resignation"?

12 A Yes, it is.

13 Q Okay. And Ms. Wilson wrote to you, "Due to the repeated
14 COVID-19 cases at our location, please consider this my formal
15 letter of resignation. I can no longer continue to put my
16 family at risk. The store has not went a full 14 days without
17 a case. Attached are photos of the announcements on which I
18 based my decision." There's a typo, but it says, "Thank you for
19 the opportunity to work with you." And it's signed by Justice
20 Wilson. Do you see that?

21 A Yes, I do.

22 Q Is this the email that you received?

23 A Yes, it is.

24 Q Okay. She -- she -- Ms. -- Ms. Wilson references that she
25 atta -- is attaching photos of the announcements. And then she

1 attaches the photos. Can we go to the second page, please?

2 And these are the attachments to her email, correct?

3 A Yes.

4 Q What are these notifications?

5 A These are the notifications that we received on our phones
6 every time there is a positive -- there was a positive case in
7 the store.

8 Q And so Ms. Wilson attached the June 9th notification, the
9 June 25th notification, the July 13th notification, and the
10 July 30th notification, as well as a notification earlier
11 that -- that week that there had been a team member or team
12 members who had confirmed COVID-19 cases. Is that right?

13 A Yes.

14 Q Okay. And was this the only reason that you ever heard
15 from Ms. Wilson as to why she was resigning her employment?

16 A Yes, it is.

17 MR. BROWN: Okay. I do not have any further questions.

18 JUDGE SOTOLONGO: All right. Thank you.

19 All right, Mr. Peterson, any cross-examination of Ms.
20 Sims?

21 MR. PETERSON: Yes, Your Honor. And I guess Mr. Brown,
22 are you moving for the admission of the exhibit --

23 MR. BROWN: Oh, I apologize. Thank you, Matt.

24 I'd like to move for the admission of Respondent's Exhibit
25 70.

1 JUDGE SOTOLONGO: Any objection?

2 MR. PETERSON: No objection.

3 JUDGE SOTOLONGO: All right. Respondent's 70 is admitted.
4 And that's -- we duly noted, even though the document appearing
5 on the screen reflects that -- what is marked as General
6 Counsel's -- excuse me, actually Respondent's 69, in order to
7 avoid confusion because of a prior Respondent's 69 having been
8 withdrawn, Respondent's going to remark this as Respondent's
9 70; is that correct?

10 MR. BROWN: Yes, Your Honor.

11 JUDGE SOTOLONGO: Very well. So then there -- so
12 Respondent's 70's admitted.

13 **(Respondent Exhibit Number 70 Received into Evidence)**

14 MR. BROWN: I don't have any other questions.

15 THE WITNESS: Excuse me --

16 MR. PETERSON: All right, yeah, Ms. -- good -- good --
17 good -- good afternoon perhaps where you are, Ms. Sims. I'm --
18 I'm Matt Peterson. I'm the attorney for the -- for the
19 National Labor Relations Board. I've got some -- a few follow-
20 up questions for you about your -- your testimony.

21 THE WITNESS: Okay.

22 **CROSS-EXAMINATION**

23 Q BY MR. PETERSON: First there is some -- some testimony
24 about the -- the dress code being revisited.

25 A Yes.

1 Q Do you recall that -- that testimony?

2 A Yes.

3 Q What -- what was the -- how did you find out that the
4 dress code was being revisited?

5 A I do believe we received an email from our store
6 leadership.

7 Q And is that at your store, or does that include higher
8 level regional management or corporate -- corporate level?

9 A I know from my store I got it from our store leadership.

10 Q From -- I'm sorry, from what?

11 A From our leadership at the store.

12 Q Within the store? Okay.

13 A Yes.

14 Q Did you have an understanding that this was a policy
15 throughout Whole Foods, or was it just specific to your store?

16 A Throughout Whole Foods.

17 Q And the protests that -- you said it was due to -- to
18 protesting that was going on. That included other employees at
19 other stores wearing Black Lives Matter messaging; is that
20 right?

21 A Yes.

22 Q Is your understanding of the -- the Black Lives Matter
23 movement that it's -- it's limited to police brutality?

24 A Yes.

25 Q You don't -- you don't believe that it seeks to address



1 other issues of -- of racial inequality in -- in other systems,
2 like systemic racism?

3 MR. BROWN: Objection, asked and answered.

4 JUDGE SOTOLONGO: Overruled, this is cross-examination.
5 Go ahead.

6 A Yes, I do.

7 Q BY MR. PETERSON: Yes, you do believe that it includes
8 the -- the systemic racism?

9 A Oh, I'm sorry, no, I do not. I believe it -- that
10 movement specifically was about a lot of Black and Brown men
11 and women being killed by the police during these times.

12 Q Okay. And you don't have any understanding of the
13 movement expanding or -- or including other forms of systemic
14 racism in education, voting, the workplace, any of that?

15 A No.

16 Q Did you participate in any Black Lives Matter protests
17 yourself?

18 A No.

19 Q Are you a member of any Black Lives Matter groups?

20 A No.

21 Q Do you support the Black Lives Matter movement?

22 A I believe in what they stand for, yes.

23 Q Okay. The discussion -- moving onto the discussion with
24 Ms. Wilson on July 24th that you were testifying about, that
25 had to do with a -- a shirt that she was wearing, a Black Lives

1 Matter shirt that she was wearing; is that correct?

2 A Yes.

3 Q And did it have anything to do with buttons or pins?

4 A I don't remember. I do just remember the -- addressing
5 the shirt.

6 Q Do you know Ms. Wilson to wear a lot of pins at work on
7 her apron?

8 A Yes.

9 Q And are -- do some of those relate to pride and -- and
10 rainbow flags?

11 A I'm not sure.

12 Q You don't remember any of those shirts?

13 A No.

14 MR. BROWN: Objection, I think you said pins, and now
15 you're saying shirts?

16 MR. PETERSON: I'm sorry, I -- yes, I -- I misspoke, thank
17 you.

18 Q BY MR. PETERSON: Do you recall Ms. Wilson wearing shirts
19 that said, Black Fathers do Exist?

20 A I think -- I believe I've seen that shirt before.

21 Q You know that that was a --

22 JUDGE SOTOLONGO: Excuse me, Mr. Peterson, I misheard you.
23 The shirt said what?

24 MR. PETERSON: Black Fathers do Exist.

25 JUDGE SOTOLONGO: Okay. All right. Thank you.

1 Q BY MR. PETERSON: You -- you recall her wearing that from
2 time-to-time?

3 A I believe I might have seen that shirt one time. I'm not
4 100 percent sure.

5 Q Okay. Do you recall Ms. Wilson bringing up in that
6 meeting on July 24th the fact that she was wearing pride and
7 equality-related pins?

8 A No.

9 Q You don't remember that being part of the discussion?

10 A No.

11 Q Did -- did Ms. Wilson report to any shifts between July
12 24th, the day of that meeting, and her -- her resignation?

13 A No.

14 Q Was she scheduled to work during that time period?

15 A I'm pretty sure she was, yes.

16 MR. PETERSON: No further questions, Your Honor.

17 JUDGE SOTOLONGO: All right. Ms. Doherty, any questions
18 for Ms. Sims?

19 MS. DOHERTY: No thank you, no questions, Your Honor.

20 JUDGE SOTOLONGO: All right. Mr. Brown, any redirect?

21 MR. BROWN: No, Your Honor.

22 JUDGE SOTOLONGO: All right, I do have a question, just
23 for my understanding, Ms. Sims. And of course if any of you
24 have any follow-up questions based on mine -- just for my own
25 understanding, Ms. Sims, all right, you said that in June, you

1 had a talk with your team members, a refresher course, I
2 believe you called it, regarding the uniform rules, the dress
3 code; is that correct?

4 THE WITNESS: Yes.

5 JUDGE SOTOLONGO: And if I understood you correctly, that
6 refresher course, as you call it, was triggered by or -- or
7 caused by certain -- as I understood it, some protest activity
8 that occurring in the area at the time?

9 THE WITNESS: Yes.

10 JUDGE SOTOLONGO: And by that you meant -- did you mean
11 Black Lives Matter protests?

12 THE WITNESS: Yes.

13 JUDGE SOTOLONGO: Had there been protests either right
14 outside the store or inside the store?

15 THE WITNESS: Not inside the store. I do believe it got
16 really close to the store, so we had to take precautions
17 before.

18 JUDGE SOTOLONGO: I see. And so there had been some
19 demonstrations of protests in -- in the area -- in the general
20 vicinity of the store?

21 THE WITNESS: Yes.

22 JUDGE SOTOLONGO: Okay. And all right, did the store
23 suffer any damage such as broken windows or anything like that
24 as a result of these protests?

25 THE WITNESS: No, sir.

1 JUDGE SOTOLONGO: All right. The -- the -- the T-shirt
2 that Ms. Wilson wore that was the -- the reason for the July
3 24th meeting, it was -- it was a T-shirt?

4 THE WITNESS: So the T-shirt wasn't the reason for the
5 meeting. She was getting a corrective, and then the store
6 leadership noticed her shirt after we did the corrective.

7 JUDGE SOTOLONGO: Okay, the corrective was for something
8 else?

9 THE WITNESS: Yes.

10 JUDGE SOTOLONGO: Okay, so the corrective had to do with
11 some conduct she had engaged in?

12 THE WITNESS: Yes.

13 JUDGE SOTOLONGO: Whatever -- some conduct in -- with
14 relation to customers?

15 THE WITNESS: Yes.

16 JUDGE SOTOLONGO: Okay, but that -- that -- that had
17 nothing -- did that have anything to do with the Black Lives
18 Matter movement, that they interchanged with customers?

19 THE WITNESS: I don't -- I wasn't there for the
20 interaction for that, but no. I can't -- I don't know the gist
21 of what happened. I was there as her leader.

22 JUDGE SOTOLONGO: I see.

23 THE WITNESS: But I do know that as we finished with the
24 correctives, that's when Claire noticed her shirt.

25 JUDGE SOTOLONGO: Okay, so in other words, if I understand

1 you correctly, she was called to the meeting for this
2 corrective action, having to do with an interaction she had
3 with customers that had nothing to do with Black Lives Matter;
4 is that correct?

5 THE WITNESS: Correct.

6 JUDGE SOTOLONGO: While she was in this meeting, then you
7 or Claire noticed that she was wearing a T-shirt that said
8 Black Lives Matter?

9 THE WITNESS: Yes. Claire noticed her shirt.

10 JUDGE SOTOLONGO: And did the T-shirt say anything else
11 besides Black Lives Matter?

12 THE WITNESS: I personally don't remember exactly what was
13 on the shirt.

14 JUDGE SOTOLONGO: Okay, now based on other testimony we've
15 heard in this case, my understanding -- and please correct me
16 if I'm wrong -- is that in many cases and many instances, team
17 members wear, like, aprons over their street clothing shall we
18 say, is that -- is that correct?

19 THE WITNESS: Yes.

20 JUDGE SOTOLONGO: Okay. What -- was -- was Ms. Wilson on
21 this day wearing an apron over her Black Lives Matter T-
22 shirt?

23 THE WITNESS: Yes.

24 JUDGE SOTOLONGO: Okay. So how did Claire notice that she
25 was wearing a Black Lives Matter T-shirt under her -- what I

1 mean, in other words, did the apron cover the message, or the
2 message was clearly visible?

3 THE WITNESS: Yes. I'm not sure if her apron -- she could
4 have easily had the apron pulled down, or she could have had
5 the apron off.

6 JUDGE SOTOLONGO: Okay, so she may have taken the apron
7 off for the meeting?

8 THE WITNESS: Yeah.

9 JUDGE SOTOLONGO: Okay. So this is something that was not
10 necessarily visible when she had her apron on; is that correct?

11 THE WITNESS: Probably not. Because I personally didn't
12 notice it -- notice the shirt that day.

13 JUDGE SOTOLONGO: Okay. So -- so understood. So it was
14 during the meeting she apparently took the -- either lowered it
15 or took off her apron, and that's when Claire noticed that she
16 had a T-shirt with this message?

17 THE WITNESS: Yes.

18 JUDGE SOTOLONGO: I see, okay. All right, no further
19 questions. That was just my -- my --

20 Any -- any questions based on my questions, please go
21 ahead.

22 MR. BROWN: Yeah, Your Honor, if I could, just very
23 quickly.

24 **REDIRECT EXAMINATION**

25 Q BY MR. BROWN: The summer of 2020, May and June, there

1 were -- you remember the protests in -- some of the violent
2 protests in Atlanta?

3 A Yes.

4 Q Okay. And you testified when the judge asked you about
5 your store, that you -- I think you -- you used the words
6 precautions, that the store took precautions?

7 A Yes.

8 Q And what precautions did the store take?

9 A We had to take two specific precautions. At Whole Foods,
10 we keep tills on the floor maybe two nights, three nights out
11 of the week. Seven days a week we had to take all money off
12 the floor and lock it up every night. Also, we had to take all
13 chairs inside the store in case protests did come that way,
14 nobody can pick up the chairs and throw them at the windows.

15 MR. BROWN: Thank you.

16 THE WITNESS: You're welcome.

17 MR. PETERSON: Yeah, just one -- one question, Ms. Sims.

18 **RECROSS-EXAMINATION**

19 Q BY MR. PETERSON: How -- what -- you -- you testified
20 about these protests being in the -- in the general area.

21 A Yes.

22 Q Can you be more specific? Like, was this within blocks,
23 or the same street, or -- or -- or miles away?

24 A It -- I'm not sure exactly. It may have been, like,
25 blocks, or maybe like a mile or so away. But it was close

1 enough that it would be on the store leadership's radar.

2 MR. PETERSON: Thank you, nothing further.

3 THE WITNESS: You're welcome.

4 JUDGE SOTOLONGO: Ms. Doherty?

5 MS. DOHERTY: I don't have any questions, thank you.

6 JUDGE SOTOLONGO: All right.

7 Thank you very much. All right, thank you Ms. Sims.
8 You're excused. Please do not discuss your testimony with any
9 other witness or potential witness in this matter until this
10 whole case is over, all right?

11 THE WITNESS: Yes, sir.

12 JUDGE SOTOLONGO: Now, thank you very much and have a --
13 have a good day.

14 THE WITNESS: Thank you, you too.

15 JUDGE SOTOLONGO: All right.

16 MR. BROWN: Your Honor, if you could give me just 30
17 seconds to say good-bye to Ms. Sims, I -- there's something I
18 would like to address with the -- with the Court.

19 JUDGE SOTOLONGO: Yes, let's -- let's go off -- let's go
20 off the record.

21 MR. BROWN: Thank you.

22 (Off the record at 10:27 a.m.)

23 JUDGE SOTOLONGO: All right, back on the record. I'm
24 sorry, Mr. -- Mr. Brown?

25 MR. BROWN: Yes, Your Honor. I'd like to move to dismiss

1 the complaint as it relates to the Atlanta store, in
2 particular, paragraph 7H of the complaint, which is on page 15
3 of -- of the complaint. While this is a general complaint
4 against Whole Foods Market, these are consolidated cases, and
5 we've been going store to store, city to city, because each
6 store is an independent part of the complaint, with its own set
7 of facts.

8 The Atlan -- what we have here in Atlanta, Your Honor, is
9 one document introduced by counsel for the General Counsel, and
10 the un rebutted testimony of the only testifying witness in
11 Atlanta. And with Ms. -- the complaint alleges constructive
12 discharge of Ms. Wilson. The only evidence in the record as to
13 her leaving Whole Foods Market is her -- is the -- is the
14 Respondent's Exhibit 70, which was admitted into evidence, and
15 says that she voluntarily resigned due to COVID. That's the
16 only evidence as to the rationale and reason for her leaving
17 her employment at Whole Foods. The government cannot, based on
18 the evidence that's been presented, establish constructive
19 discharge.

20 As to the allege -- alleged protected concerted activity,
21 there is absolutely no evidence in the record, either through
22 the one exhibit that has been introduced by General Counsel, or
23 through Ms. Sims' testimony, that this was concerted activity.
24 This was one team member acting alone, and there's no record
25 evidence to the contrary. In addition to that, as it relates

1 to both the concerted and protected allegations, the only
2 evidence is that Ms. Wilson wore the Black Lives Matter T-shirt
3 to protest violence against Black people. She referenced the
4 murder of an African American on the BART system by the police.
5 She referenced (b) (6), (b) (7)(C) ,
6 and she was supporting "the movement." And the only testimony,
7 the only record testimony, is that that movement related to
8 violence inflicted by -- by the police against African
9 Americans and people of color.

10 That's it. It's unrebutted, and it does not relate to
11 Whole Foods Market. It does not relate to a term and condition
12 of employment. It does not, as it's set forth in e-stats
13 (phonetic), relate to employee's interest as an -- employees.
14 The government has completely failed to present any evidence to
15 make out a prima facie case in Atlanta.

16 JUDGE SOTOLONGO: Very well.

17 Mr. Peterson?

18 MR. PETERSON: Yes, Your Honor. So yeah, so obviously
19 there is -- there is different evidence that comes from
20 different stores. They -- they -- they've been consolidated.
21 We're -- we're seeking a -- a nationwide remedy. Part of the
22 theory -- and there are different theories at play as well --
23 with what -- with it -- it's -- obviously, this case kind of
24 stems from the -- well, a major part of the case is the rules
25 that address -- the appearance rules themselves, which are

1 alleged to be unlawful on their face, under the -- un -- un --
2 under the Board's relatively recent decision in -- in
3 Continental Group.

4 But prior to that, any discipline issue pursuant to a --
5 an unlawful rule would have been found unlawful as well. But
6 in Continental Group, there were two different prongs for
7 finding that unlawful. One being that the employee was engaged
8 in protected activity, and the other being that the -- that
9 the -- that the activity touched upon the concerns implicating
10 Section 7, which is a -- a -- a lesser standard than -- than
11 the protected concerted activity.

12 There's also evidence inclu -- you know, of this -- of --
13 of employees wearing Black Lives Matter around the country.
14 The Respondent's witness just testified that --that she was
15 aware that there were other employees in other stores around
16 the company. So there's also an -- an argument about the --
17 the per -- you know, perceived -- you know, perceived concerted
18 activity. We've had a lot of testimony about what is concerted
19 and what isn't. And -- and you're seeing that at different
20 stores, there were -- there were different levels of -- of --
21 of concert. But I think again, this is another -- another --
22 a -- a -- a -- a motion that should be -- you know, this should
23 be reserved for -- for briefing at the end with the
24 constructive discharge. I mean, yeah, we -- we have -- we have
25 the evidence that we have. And -- and -- and we are planning

1 on making arguments.

2 There's a -- there's a -- there's a possibility that the
3 General Counsel on its own will consider amending the
4 complaint. But there is -- you know, for constructive
5 discharge, there's the -- there's the Hobson's Choice Theory,
6 where -- you know, where employees -- when an employee is
7 forced to choose between engaging in Section 7 activity and
8 continuing to work, that can -- that can be considered a
9 Hobson's Choice. I recognize that Ms. Wilson's resignation
10 letter does not -- does not lend support to that. But we do
11 have evidence that she was very upset and did not report to her
12 subsequent shifts before resigning. And that is at least
13 evidence that could support a constructive discharge theory.
14 I'm not saying that it is the strongest theory, but it's --
15 I -- I -- I think that dismissing it at this point is -- is --
16 is inappropriate, and -- and it should be reserved for the --
17 for your final decision.

18 JUDGE SOTOLONGO: I -- I will reserve my ruling -- my
19 decision. I don't think I'm ready to dismiss any of the claims
20 to this point. However, Mr. Brown, Respondent, has raised some
21 very valid concerns. Certainly, I have to say, regarding the
22 constructive discharge theory, the evidence appears to be very
23 weak in light of the fact that the only evidence we have at
24 this point is Ms. Wilson's resignation letter, and right now,
25 as I see it, frankly, I don't think there -- there -- there is

1 no evidence of a Hobson's Choice that the Board requires. The
2 catch-22 Hobson's Choice, that -- that the Board requires
3 Res -- Respondent to -- to put the employee in -- in a -- into
4 to afford a theory for constructive discharge. But having said
5 that, I will reserve -- I will look up the evidence.
6 Certainly, I have to look more closely at the evidence that --
7 that is reflected by General Counsel's Exhibit 66, the exchange
8 of emails, and what -- what, if anything, that says or
9 establishes regarding an employer's policy with regarding to
10 Black Lives Matter messaging. So I will reserve my ruling for
11 my decision.

12 MR. BROWN: Thank you, Your Honor.

13 MR. PETERSON: Thank you, Your Honor.

14 JUDGE SOTOLONGO: All right, we need to discuss what has
15 happened here as of late. Let's leave aside the question of
16 the severance motion that was made by Respondent. That is
17 something that I'll take into submission. And I just -- I only
18 received General Counsel's response late last night, and I need
19 more time to consider the arguments raised both by Respondent
20 and the General Counsel. Both have raised some -- some valid
21 points. And which need to be further considered by me. And I
22 will make a ruling on that in due course.

23 Certainly, if I were to -- to reach a decision that this
24 case as requested by Respondent, should be severed, I will give
25 you plenty of notice before you travel anywhere, or before you

1 make any further plans. So I will reserve a ruling. I hope to
2 make a ruling in the very near future about that. But it --
3 the exact timing of which depends on what happens next. And by
4 that I mean, we need to discuss the motion that was made by the
5 Charging Party on Tuesday night, that I actually read yesterday
6 morning.

7 And I have to say, I -- I am very, very troubled by -- by
8 this motion. And the reason that I'm troubled is that this
9 schedule has been set since April the 12th when I issued my
10 order. And that order was issued based on -- on the mutual
11 agreement of the parties that had negotiated. And I -- and I
12 give you a lot of credit for that. You negotiated and
13 discussed a schedule, you came to an agreement, and -- and I
14 put my informateur (phonetic) into that agreement. I -- I
15 signed an order on April 12th. That order set a schedule, that
16 including the in-person hearing for Washington DC next week,
17 starting on the 19th through -- Tuesday the 19th through --
18 through Friday the 22nd.

19 So I am very, very troubled that basically, what it's
20 really 11th hour, we have now received a motion informing us
21 that the two primary, if not the only two witnesses that
22 General Counsel was to call for next week -- and I don't know,
23 and Mr. Peterson you're going to have to address this in a
24 second. They're -- but I'm assuming that if not the only ones,
25 certainly the principal ones, since these -- these are the two

1 alleged discriminatees that are -- that ro -- that arose out of
2 stores in the Washington DC area, namely Maryland and Virginia.
3 And now we're told that these witnesses no longer reside in the
4 Washington DC area, but rather one of them is now residing in
5 eastern Washington State. Apparently she's guiding rafting
6 tours there, and the other one is now residing in Honolulu,
7 Hawaii. And based on -- on the fact that these two witnesses
8 are in those locations, the Charging Party has made a motion
9 that we hold a virtual hearing next week rather than the in-
10 person hearing that had been agreed to and ordered by me.

11 I think that, quite frankly, I'm disturbed by this,
12 because we have had plenty of time since mid-April when I
13 issued my order, to sort this out. I think we should have
14 received notices several weeks ago that these witnesses were
15 not available. I -- I am flabbergasted quite frankly, that at
16 this late of a date, we were informed that, oh, we just found
17 out that these witnesses are not available. At least, not
18 available physically in -- in the -- in the -- to hold a --
19 to -- to hold an in-person hearing and to provide live
20 testimony in person in -- in Washington DC as we had agreed to.

21 Now, frankly, you know, going to Washington DC in mid-July
22 is not, you know -- it's not exactly something that I look
23 forward to. But that's nonetheless -- that is something that
24 we had agreed to. So I need an explanation from both the
25 General Counsel and the Charging Party as to why, now, after

1 three months -- three months after we set the order -- three
2 months after we agreed upon the schedule we find out that these
3 two persons are not available for in-person testimony in
4 Washington, DC. So why now? It seems to me that that
5 reflects, quite frankly, what I perceive to be a -- whether
6 it's a lack of preparation or -- or -- or due diligence. I
7 don't know what to call it, quite frankly, but it's very
8 disturbing. And -- and you know, we had made plans -- we had
9 made travel plans. Now, I -- you know, hotel reservations can
10 be cancelled, airline tickets have been purchased, and I
11 don't -- I'm not going to lose personally any money; the
12 taxpayers are paying for my ticket. That can be cancelled.
13 There's some fees that the Government may have to incur. I
14 can't say the same for Respondent, who may have already made
15 purchase travel -- airline tickets to the Washington, DC area
16 and now may be incurring costs associated with that. I find
17 this to be really, really troubling.

18 So please, General Counsel, starting with you Mr.
19 Peterson, I want an explanation as to why now after all these
20 months we hear that these witnesses are not available.

21 MR. PETERSON: Thank you, Your Honor.

22 I think -- yeah, no, as you -- as you pointed out, we had
23 gone through a fair amount of effort to come up with a schedule
24 that could accommodate either a -- a in-person or -- or virtual
25 testimony, depending on the circumstances on the ground. At

1 that point, my understanding was that -- that witnesses were --
2 that we had chosen those locations because the witnesses
3 were -- were nearby and accessible.

4 You know, the -- the -- the schedule was built with some
5 flexibility for -- for -- for eventualities that may come up.
6 Obviously, we've not used all the days that we needed. That
7 being -- that being -- that being said, I learned -- and
8 I've -- I've been primarily communicating through Charging
9 Party counsel -- that's how I've been communicating with the
10 witnesses. It was a couple weeks ago, maybe -- yeah, maybe
11 three weeks ago that I was -- you know, it was first brought to
12 my attention that one of the witnesses was out of state and you
13 know -- and then -- and then we discussed whether -- you know,
14 whether remote testimony would be possible. I had -- I -- I
15 can't remember if it was on the record or off the record, but
16 we had previously -- I had previously floated the idea of
17 holding this EC hearing virtually, but that was -- that was
18 objected to. So -- so -- so knowing that, I suggested either
19 filing a motion such as -- you know, such as that was -- that
20 was recently filed or working to make steps to try and make the
21 witness available. My understanding is that they were working
22 on steps to make the witness available to be physically -- to
23 be physically present. Last week I learned that -- that those
24 efforts had failed. And also, that there is a -- the other
25 witness was also unable to -- unable to -- was out of state and

1 was unable to make the travel. And I made the same suggestion
2 that either to file a motion immediately or we need to make
3 steps to make the witness available.

4 I understand that the witness was trying to -- looking for
5 tickets. If you're -- if you're following the travel situation
6 these days, it's horrible. If you've experienced some of it,
7 there are many cancelations. Flights are extremely expensive.
8 When it became apparent that it was infeasible for these
9 witnesses to financially, and also, I understand there's some
10 personal family issues with one of the -- one of the witnesses
11 that have come up that I think are listed in the brief of the
12 Charging Party counsel. When that became apparent, I reached
13 out to Whole Foods counsel, let them know what was going on.
14 Sought agreement on possibly doing it virtually, and they
15 objected.

16 In the meantime, in support of the Charging Party's
17 motion, we were based on kind of Board law that was around. A
18 lot of it pre-dates the pandemic and the experience that
19 everyone's had with video conferencing. But that it was --
20 that finding if a witness could testify from a regional office
21 that that provided additional reliability assurances.

22 So we've reached out to the Seattle and which is the
23 nearest one for one of the witnesses, and the Honolulu office
24 to make that office space available. Unfortunately, the -- one
25 of the offices is also in the process of the move. There is

1 there is office space at both locations.

2 There is not a government laptop available or smart board
3 for holding the hearing. There's a possibility that the
4 Seattle location, one of the regional attorney, considered
5 loaning her laptop to the witness if need be, which is
6 obviously not ideal. But I guess that's a long way of saying
7 we've been trying to make steps to avoid this situation, trying
8 to get the witnesses to be physically present. And when that
9 became apparent, tried to do everything possible to facilitate
10 their testimony by video conference.

11 So that's my story. I'm -- I agree that it is unfortunate
12 that this is all culminated so close to the hearing date. But
13 the General Counsel supports the Charging Party's motion and
14 thinks that the witnesses are important. And in these
15 circumstances we think it's obviously, unfortunate, but
16 reasonable to allow them to testify virtually if needed from
17 one of the Regional offices. But again, there's not that --
18 there's not advanced technology access there, and neither of
19 the witnesses have their own laptops or computers.

20 JUDGE SOTOLONGO: All right. Before I address your
21 remarks, I'm going to let Mr. Brown or Respondent --

22 MR. BROWN: And Ms. Schaefer --

23 JUDGE SOTOLONGO: Yes.

24 MR. BROWN: -- is going to address this issue.

25 JUDGE SOTOLONGO: Schaefer.

1 MS. SCHAEFER: I'd say one thing. I think this is a
2 reason to reconsider your position on our motion to sever.
3 Should certainly be taking that into account as you're
4 listening to this. I think, Your Honor, I just want to be
5 clear, we received word that Ms. O'Neill and Ms. Christie would
6 not be in DC on Friday. So this is not something that we've
7 known and that we've had a chance to react to any more than you
8 did.

9 JUDGE SOTOLONGO: Ms. Schaefer, you mean last Friday?

10 MS. SCHAEFER: Yes. We got -- and then we were expecting
11 the motion that, again, wasn't filed until Tuesday. So this
12 isn't something that we've known about. Just to make that very
13 clear because there was a little confusion about or I was -- I
14 thought there was some ambiguity about what Mr. Peterson just
15 said. I think we --

16 MR. PETERSON: Yeah, just to --

17 MS. SCHAEFER: -- should get here --

18 MR. PETERSON: Yeah, just to confirm. Yeah, I emailed
19 Respondent's counsel on Thursday, and it was later in the
20 evening here. So I didn't get a response until Friday.
21 Anyways, I'm sorry to interrupt. But I did -- if I caused any
22 confusion, I did not mean to.

23 MS. SCHAEFER: I think we share your frustration about how
24 this has been handled. And it's compounded by the fact that
25 we're here for the Atlanta hearing and the General Counsel

1 doesn't have a witness here either. I think for starters, as
2 pointed out, the complaint's been outstanding since December
3 2021. These charges have been -- were filed in 2020. We got a
4 scheduling order that you alluded to that's been in place since
5 April of 2022. And the Charging Party's attorney was part of
6 that discussion and signed that scheduling motion as well.

7 So this is not just something that the General Counsel's
8 been involved with. The Charging Party's attorneys were well
9 aware of that scheduling motion, and the intention was to hold
10 these hearings where the witnesses are in -- and our -- the
11 stores in this case are in DC, and Maryland and Virginia. I'm
12 sorry, Maryland and Virginia. Our Whole Foods witnesses are in
13 that area.

14 The charges were filed in Region 5. That's where they
15 were investigated. It's really only because these cases have
16 been consolidated that we're even sort of having this
17 discussion. We're not just in Baltimore trying these two
18 charges. For them to suddenly alert us that the charging
19 parties are suddenly not able to testify, is frankly
20 unbelievable.

21 I also want to point out that according to Charging
22 Party's attorneys, Ms. O'Neill apparently, now, lives in
23 Washington State and works in Idaho. We tried to work this
24 schedule out around where people were. The fact that they
25 didn't speak up and let us know, so that we could have

1 rearranged the schedule, possibly, to do Seattle first then DC,
2 I mean, there were options that were available and ways that we
3 could have tried to accommodate this. And instead we're sort
4 of being faced with a Hobson's choice here.

5 So I think one of the concerns that we also have is that
6 Ms. Christie, who is the subject of the Maryland charge, worked
7 in a Whole Foods store in Columbia, Maryland, until she
8 submitted her resignation in October 2020. One month later, in
9 November 2020, Ms. Christie began working for Whole Foods in
10 Honolulu, so she actually, continued working for Whole Foods
11 after she resigned from Whole Foods in October of 2020. She
12 worked in that Whole Foods until April of 2021.

13 So setting aside the fact that, as you'll find in the
14 complaint, Ms. Christie is an alleged constructive discharge
15 from that October separation from the Columbia store despite
16 the fact that she then went to Honolulu. She's been in
17 Honolulu since 2021 -- I'm sorry, since 2020, at least up until
18 April 2021. So the idea that this is something they just
19 discovered is frankly incredible.

20 More importantly, her own attorneys were representing her
21 in the Title VII case that up until two weeks ago was actively
22 being litigated. These parties were subpoenaed. They've been
23 producing documents. So again, it's just absolutely, frankly,
24 ridiculous that we're -- that we're sitting here today.

25 I also want to make it clear that the General Counsel has

1 not indicated that he issued subpoenas to these Charging
2 Parties, that any efforts have been made by the government to
3 compel them to appear. And so we're -- and I also just want to
4 respond specifically, to the case law that the Charging Party
5 cited. It's worth pointing out that in the DH Long Point, in
6 Encore, in EF International Language School, all of those
7 cases, the people who were permitted to testify were not the
8 charging parties and were not discriminatees. They were
9 additional witnesses that were necessary for background
10 information. And so there was reason potentially under any
11 views the administrative law judge.

12 The more appropriate case to look at here is Tesla where a
13 Charging Party lived in Buffalo, New York, filed a charge
14 against Tesla. The trial was held in Oakland, and the General
15 Counsel did not subpoena the witness, and refused to pay to
16 have the witness travel from Buffalo to Oakland, and wanted to
17 have the witness testify telephonically. And Administrative
18 Law Judge Tracy denied the motion, and the Board upheld that
19 denial. And that's the position we find ourselves in today,
20 where two charging parties are refusing to appear for a hearing
21 in Washington, DC in person that's been ordered by, Your Honor.

22 JUDGE SOTOLONGO: That is a very valid point, Ms.
23 Schaefer, and I agree. This is very troubling. You're --

24 MR. PATTON: Your Honor, can I address some of those
25 points please?

1 JUDGE SOTOLONGO: Go ahead.

2 MR. PATTON: So first, I just want to kind of address the
3 question that you posed to the Charging Parties in your email
4 last night. And when we agreed to the scheduling order, it was
5 our understanding that this was a fluid discussion or fluid
6 schedule, which was highlighted in the first in-person hearing
7 when Whole Foods the day before one of their witnesses was
8 supposed to testify, informed all of us for the first time,
9 that that individual was going on vacation And that individual
10 was permitted to testify remotely.

11 MS. SCHAEFER: Your Honor, that's not what happened there.

12 MR. PATTON: That the -- that --

13 JUDGE SOTOLONGO: I'll address that in a second, Ms.
14 Schaefer.

15 But, I'll let you -- go ahead.

16 MR. PATTON: So really, I think we should look to what Ms.
17 Schaefer started with, which is what this is, is a failed
18 attempt to push forward their motion to sever. Your Honor,
19 absolutely should take that under consideration and rule on
20 that. But the idea that these witnesses are refusing to
21 testify is just not true. They're willing to testify. We've
22 secured the law office in Hawaii that they can testify from.
23 We've, as Mr. Peterson has said, there is a Seattle office for
24 the NLRB. For the past two and a half years our firm has been
25 ensuring that people are able to testify remotely.

1 The standard is there a compelling circumstance, and are
2 there safeguards in place? There are clearly compelling
3 circumstances if a witness is able to testify remotely because
4 they were on vacation. If these two witnesses have to pay
5 thousands of dollars to travel to Washington, DC, and if they
6 have to take time off work. They're low-wage workers. As was
7 detailed in the brief, one of their husbands was potentially
8 deploying to the Air Force today. These are compelling
9 circumstances. I'm not rea -- and we've been talking to them
10 As was detailed, there have been different issues that these
11 individuals have been dealing with in their personal life. We
12 have given notice a lot sooner than Whole Foods gave notice.

13 MS. SCHAEFER: I just -- if I could on the Phil Devito
14 (phonetic) issue, the issue -- he was not going on vacation.
15 Mr. Devito was on vacation, a scheduled vacation that we were
16 aware of for the second week of the hearing. If you'll
17 remember, we had a third week of hearing in Boston scheduled,
18 and Mr. Devito was scheduled to testify. We had been in
19 communication with him and planned to have him testify that
20 third week, and he was the only outstanding witness. And so
21 rather than have us all go back to Boston as part of the
22 schedule, all of the parties consulted and agreed that rather
23 than all of us fly back to Boston for Mr. Devito, that we would
24 do it by Zoom. We were more than willing to have everyone fly
25 back to Boston. Mr. Devito would have appeared in person.

1 JUDGE SOTOLONGO: That is correct.

2 MS. SCHAEFER: That's not what we're talking about here.

3 JUDGE SOTOLONGO: And also, that's is correct. And also
4 there is an assumption of the facts, as I recall, that -- that
5 the General Counsel's case concluded sooner than expected,
6 because two of its witnesses were not available and didn't
7 testify. So therefore, we found ourselves basically ending our
8 case sooner than we had expected in Boston. And also, there
9 was a witness for General Counsel that because she violated one
10 of the rules that I set down, namely that only be given notice
11 of, and then the federal subpoena material needed to be
12 produced and within 48 hours. And I allowed the witness to
13 testify remotely. I forget her name now. Because we were
14 going to do that the following week for the reason Ms. Schaefer
15 explained.

16 Now, when I said there was some latitude built on the
17 schedule, it wasn't because of the unavailability of witness.
18 It was because of COVID, and I said so in my order. I said,
19 obviously, that COVID is a totally fluid situation and if the
20 infection rate -- infection rates increased to the point that I
21 was not healthy and not safe for us to convene in person, then
22 we needed to look at possibility of doing so virtually.

23 The Board has been holding meetings for the last two
24 years, as you know, virtual hearings, because of the pandemic.
25 That has been the compelling circumstances that we've been

1 talking about. The rules remain that NLRB hearings are
2 conducted in person, period, full stop. Those are the rules.
3 The rules have not been amended. The Board has given judges
4 flexibility -- discretion because of the pandemic, because of
5 the compelling circumstances due to the pandemic and only due
6 to the pandemic, to building flexibility in their schedules.

7 And here, we have a situation where the schedule has been
8 set for three months, and the parties due diligence compels and
9 requires that witness to be found and tracked down. And if
10 they are not available for whatever reason because they have
11 moved on, I understand perfectly well that, it's been two years
12 since the events that we are discussing and litigating here
13 occurred. And people's lives move on and people move. I
14 understand that perfectly, but that has to be taken into
15 account when the schedule is apparently agreed to. And as Ms.
16 Schaefer pointed out, yes, attorney -- General Counsel has a
17 responsibility to subpoena and foot the bill quite frankly, for
18 travel if necessary. Now, I understand the Board is having
19 budget problems, but frankly, that is not the problem of
20 Respondents here.

21 And so as in the case, as Mr. Schaefer pointed out, in the
22 case of Tesla, Charging Party had moved and the General Counsel
23 won't subpoena that person. And that case -- that person's
24 case was dismissed. And I don't see why the circumstances here
25 are different. We should have been noticed a lot sooner that

1 these individuals were not available. Something that due
2 diligence required that -- that they be tracked down, and if
3 they were unwilling, unable to testify, or General Counsel was
4 unwilling to subpoena them and foot the bill for their travel,
5 then we should have been notified, so that plans could be
6 altered and schedules could be altered.

7 As I said at the very beginning, I'm sure that Respondent
8 has already incurred travel tickets, airline tickets to go to
9 DC I know I have, although I'm not paying for it. The
10 government is, the taxpayers are. And I think it just really
11 troubling that we wait until now, a week before the trial, to
12 be noticed. So I'm going to take this as a summation, but I'm
13 really troubled by this.

14 Let me ask you this, Mr. Peterson. Do you have any other
15 witnesses besides these two individuals for next week's
16 scheduled hearing?

17 MR. PETERSON: No, Your Honor. Yeah, that's what I
18 pointed that out earlier, hoping -- before I knew that they
19 were unavailable. But that's why I proposed doing DC
20 virtually. But no, those are our only two witnesses.

21 JUDGE SOTOLONGO: I mean, let me ask you this. Mr. Brown,
22 Ms. Schaefer, I assume that Respondent had lined up its
23 witnesses, and they're ready to testify in person in
24 Washington, DC?

25 MS. SCHAEFER: Your Honor, our -- and just to be clear, we

1 think it's totally inappropriate for the Charging Party's
2 motion to be somehow bootstrapped to require our witnesses to
3 testify remotely. Let me --

4 MR. BROWN: And our witnesses are available, and they're
5 already traveling. They will be traveling to DC some
6 considerable hours to testify, and they're prepared to do so.

7 JUDGE SOTOLONGO: Well, like I said, I -- frankly, I'm
8 really, really troubled by this. And I'm going to make a
9 ruling within, hopefully by tomorrow, in writing about this.
10 But this is really troubling. I -- the rules of virtual
11 hearings are based on the pandemic and not -- and nothing else.
12 The Board rules still require in-person testimony. That is one
13 of the preferred method -- the only method, except for
14 compelling circumstances.

15 And Charging Parties being unavailable because they have
16 moved on is not one of those compelling circumstance. So and
17 had this been dealt with several weeks ago, as it should have,
18 perhaps there should have been -- there could have been some
19 accommodation. And at this late of an hour, like I said, this
20 is something that I find to be untenable and unconscionable,
21 quite frankly. I will make a ruling on this by tomorrow.
22 Anything further?

23 MR. PETERSON: No, Your Honor.

24 JUDGE SOTOLONGO: All right.

25 MR. FERRELL: Your Honor, it's Mike Ferrell, if I may?

1 Your earlier order had indicated -- your earlier written order,
2 I think to the General Counsel to show cause or to file a
3 response to our motion to sever indicated that there would
4 be -- you would hear of some argument on that motion today.
5 And I know we're at the end of today, but I wonder if we might
6 indulge just a few minutes? And we are going to take it under
7 consideration, but to hear argument from the parties to
8 supplement your consideration of that motion briefly in light
9 of the events of today, for today in Atlanta and for next week?

10 JUDGE SOTOLONGO: Your point is well taken, Mr. Ferrell.
11 Go ahead and make your point. I think I did say we were going
12 to argue this. And I stand corrected. I just simply forgot in
13 light of the latest events and which are more immediate, as you
14 can understand as we're all set to travel to Washington, DC on
15 Monday. So perhaps sooner in your case? I don't know. I'm
16 ticketed to travel to DC first thing Monday morning.

17 So go ahead and address your motion to sever. But -- I'm
18 going to -- before we start, let me say this. I'm really,
19 assuming for a second, because I will make a decision, and I
20 want to listen to your arguments and I'm going to make my
21 decision regarding the severance motion in due course as soon
22 as possible.

23 But let me say this. I'm troubled that I don't want --
24 assuming that I decide to deny that motion, and I decide to go
25 ahead with a hearing in Seattle and in San Francisco as

1 previously agreed to. I am very troubled. I do not want to
2 hear the week before we show up in Seattle that the witnesses
3 there are suddenly not available because they have scattered
4 through several lands. I want to hear this today. I want to
5 hear it all by tomorrow at the latest. If they're not
6 available, I want to hear this now, not the day before, not the
7 week before we travel to Seattle and San Francisco.

8 You should have had this information in your hands weeks
9 ago. I can't conceive for trial preparation being done at the
10 last minute. I know that tri -- I know that two years have
11 passed. And it is to be expected that a lot of these persons
12 may have moved on to other locations, to other states, to other
13 countries. If that is the case, we need to know that in
14 advance and then deal with accordingly. Not the week before
15 that we supposed to schedule -- supposed to show up at a site.

16 So I want to know if this is going to be a recurring
17 problem with the Seattle witness, with the San Francisco
18 witnesses. I want to know now, and I mean, by tomorrow. I
19 don't want to hear it the week before. It is simply untenable.
20 It is simply unconscionable that we go through this again. We
21 just went through it today in the case of Atlanta, when Ms.
22 Wilson didn't show up. We're hearing now that the -- we just
23 heard that the witnesses next week are not going to be there.
24 I'm getting tired of this. We need to know now.

25 So go ahead, Mr. Ferrell, or Mr. Brown or Ms. Schaefer.

1 Go ahead and address your motions separate.

2 MR. FERRELL: Thank you. Thank you, Your Honor. And not
3 to be forgotten just on the point you just made, Your Honor, I
4 remind you that Abdulai Barry was another Charging Party from
5 Fresh Pond in Region 1 who failed to appear.

6 JUDGE SOTOLONGO: Is that --

7 MR. FERRELL: So that's in the record. But with respect
8 to the motion to sever, Your Honor, as we pointed out in our
9 initial motion, the threshold issue in these consolidated
10 cases, in each and all of them, is whether the act of Whole
11 Foods team members wearing Black Lives Matter messaging while
12 working in their stores is protected activity under Section 7.
13 The decision on that issue will resolve all or nearly all of
14 the allegations in the consolidated complaint.

15 At this point, we have a substantial record from Whole
16 Foods stores that is more than adequate for, Your Honor, to
17 make a decision on that issue. We've had four weeks of trial
18 and testimony in Boston and Philadelphia and what record there
19 is going to be from Atlanta today. Whole Foods, "National
20 Dress Code Policy," for May of 2020 is in evidence. Whole
21 Foods March of 2020 "Facebook (sic) standard operating -- "Face
22 Masks Are a Standard Operating Procedure," is in evidence.
23 Whole Foods November of 2020, "Updated National Dress Code
24 Policy," is in evidence.

25 There is no dispute that Whole Foods applied its dress

1 code to not permit team members to wear Black Lives Matter
2 messaging while working in its stores. There is no dispute
3 that some team members who refused to comply with the dress
4 code were asked to clock out and not permitted to continue
5 working unless they were in compliance to the dress code, and
6 that some team members received attendance discipline for
7 failing to work in compliance with the dress code.

8 All that is really needed at this point for, Your Honor,
9 to make a ruling on the threshold issue in all of these cases
10 is for Whole Foods to present its corporate and expert
11 witnesses that we are currently scheduled to do in San
12 Francisco. But it would take an estimation of two days for us
13 to present those witnesses to, Your Honor, that would complete
14 the record and allow you to make a decision really on a
15 complete record for the threshold issue.

16 We would avoid approximately six weeks of additional
17 scheduled trial for witnesses that may or may not appear. We
18 were finding out today the DC witnesses are not apparently
19 going to appear. And all of that six weeks of trial for the
20 witnesses that do show up, for the Charging Parties that do
21 show up, there's no indication that that evidence would be
22 materially different with respect to the facts that go to the
23 threshold issue than the evidence we already have in the
24 record.

25 The General Counsel's opposition states that our motion



1 would not speed up the trial but result in some unnecessary
2 delay. That is nonsensical. It would eliminate not only to
3 six weeks of trial that are currently on the schedule and
4 replace it with basically, two days of trial or thereabouts.
5 But the General Counsel knows, because I've told him, and it's
6 also in our motion, our proposal is that if you would grant our
7 motion, we would revise and accelerate the trial schedule to
8 pick from the dates we currently have on the calendar.

9 We just need a date to confirm the availability of our
10 corporate witness and our expert witness, because they're not
11 currently scheduled until August. And we will accelerate and
12 move it up, present them, close the record, move the post-
13 hearing briefing, and get this issue up. It needs your
14 decision. And it will resolve all or substantially all the
15 allegations in the case. So it will most certainly speed up
16 the trial.

17 The General Counsel also argued that it would result in
18 unnecessary delay of the severed cases, the remaining cases
19 that we referred to in counsel -- for the General Counsel's
20 opposition. But the fact is the ruling on this issue will
21 really resolve all of those cases. And I told counsel for the
22 General Counsel, if there are discrete issues I could construct
23 a discharge issue, that would still be out there that need to
24 be decided or need some evidence now, tell me what those are.
25 We can accelerate them, hear that now, and be done with it.

1 But on the threshold issue, we have more than an adequate
2 record to resolve it. The General Counsel in his opposition
3 didn't identify a single unique discrete issue that still
4 requires evidence beyond the threshold issue. And one of them
5 would have been today on constructive discharge, but they
6 presented no witness to talk about facts that would support
7 constructive discharge. So I think that argument is specious
8 at best.

9 And if you also look at -- the General Counsel argued that
10 the evidence that would come from these remaining stores is
11 somehow going to be important and relevant. But as we see
12 today, and we see now, next week, I'm not sure how important
13 and relevant it can be when the Charging Parties themselves are
14 not even cooperating. And the General Counsel's not issuing a
15 subpoena to compel their cooperation in the testimony. So in
16 nowhere, in the General Counsel's opposition does he
17 articulate, does counsel to the General Counsel, articulate
18 what is supposed to be materially new or different about any of
19 this evidence, about the reasons that employees were wearing,
20 the team members, were wearing Black Lives Matter messaging at
21 those stores that's going to draw the nexus.

22 On the one hand, the General Counsel argues that this is
23 going to be important additional evidence to show the nexus.
24 But elsewhere in the General Counsel's opposition, he goes on
25 for pages, mind you, arguing that the evidence already in the

1 record, I think, quote, "Clearly shows the nexus between the
2 wearing of the Black Lives Matter messaging and the terms and
3 conditions of employment or the concern of employees as
4 important." Whether it clearly shows it already, we don't need
5 just more of the same over an additional six weeks. We can put
6 in a couple of days, present a corporate and expert witness,
7 move to briefing, and get this matter up to Your Honor.

8 And it's certain that there's going to be issues here that
9 go to the Board and elsewhere, and we can accelerate all of
10 that. For that reason, we're asking that you -- I know you're
11 taken that into consideration, but you should grant our motion,
12 that you would sever the remaining cases that are after Region
13 10 in Atlanta today, hold them in abeyance, retain
14 jurisdiction. Let's get a briefing and a decision on the
15 threshold issue that will resolve all or almost all of those
16 allegations. And let's move on.

17 JUDGE SOTOLONGO: Let me -- let me ask you this, Mr.
18 Ferrell, because this is a point General Counsel raised.
19 Obviously, the -- the -- the Seattle and San Francisco portions
20 of the case allege that employees in -- in those -- I have to
21 reread them, quite frankly. Can you give me a second? I just
22 want to --

23 MR. FERRELL: Sure.

24 JUDGE SOTOLONGO: -- refresh my recollection. But those
25 stores -- it's the allegation that individuals in those stores

1 as well as Chicago -- we're leaving Chicago out of the --
2 because we were scheduled to do a virtual hearing in Chicago.
3 Are you -- are you -- are you suggesting we cut that out also?

4 MR. FERRELL: I -- I would sever all of the cases after
5 to -- after today. Yes, Your Honor. So -- and the Chicago's
6 the Mishawaka, Indiana location.

7 JUDGE SOTOLONGO: Right. That's what I meant.

8 MR. FERRELL: Right, I understand.

9 JUDGE SOTOLONGO: So the -- the -- the -- the -- both of
10 Seattle (audio interference) and the San Francisco -- I'm
11 trying to -- both the Seattle and San Francisco portion of the
12 case -- the -- are the longer, obviously, portions that we mean
13 outstanding -- allege that individuals were disciplined and/or
14 terminated and/or constructive discharged because of these
15 activities.

16 If I were to sever the case -- if I understand you
17 correctly, Mr. Ferrell, what the Respondent is proposing is
18 that we sever portions of the case we have yet to hear, that I
19 maintain jurisdiction over -- over those, that I go ahead and
20 you go ahead and -- and wrap up your defense which you said you
21 were going to do and I was going to -- that was one of my
22 questions was where in San Francisco. You just answered the
23 question over a two-day period.

24 And I would assume that would also include your extra
25 witness?

1 MR. FERRELL: Yes.

2 JUDGE SOTOLONGO: Okay. So you would conclude your
3 defense in San Francisco, and then we would move to briefing.
4 The case would then of course -- assuming that I issue a
5 decision -- I don't know. I can't give a -- I'm not going to
6 give it a time period. Let's -- let's say I issue the decision
7 by January. Let's just say. Let's be realistic about this
8 because I have -- I have one or two other pending matters. The
9 case will go then to the Board on all appeal because whichever
10 side loses will, we all -- I think you're in agreement, you're
11 going to appeal. The Board is going to take anywhere from six
12 months -- so that would be incredibly fast -- to a year to
13 decide the case. So we're now talking about January. Let's
14 say -- let's -- speaking -- we're talking about January 2024.
15 Let's say that, unless we're being optimistic. But let's say
16 that's the case.

17 In the meantime, all these alleged discriminatees in the
18 Seattle and San Francisco areas are -- would -- are -- be
19 waiting for their day in court. Now, obviously, if the Board
20 rules that -- if the Board should rule that in fact this
21 activity -- if I were to rule, let's say for example, and the
22 Board were to uphold me that -- that this activity is protected
23 and that therefore, the disciplinary discharge of the employees
24 in question was lawful. And of course, that's going to be
25 appealed to Court of Appeals, I'm sure. So in the meantime,

1 the -- the -- the -- the -- the employees of the alleged
2 communities in the San Francisco and Seattle areas are waiting
3 for their day in court. Their discipline is out there pending
4 until this matter gets resolved. Obviously, if the Board were
5 to -- to rule that this activity was not protected, that may
6 clearly put the -- that may bring the -- the San Francisco and
7 Seattle portions to an end because it wasn't protected. I -- I
8 can't see a theory under which then even their own constructive
9 discharge would be.

10 So but let's say the Board says -- finds that -- either
11 they overrule me and finds that it is protected and -- and --
12 and these employees are waiting for their day in court for the
13 next three years. So why shouldn't we include them in this
14 case and just -- just do it all in one? It -- it would take a
15 couple of additional weeks of hearing. That's -- that's true.
16 Why keep them waiting?

17 MR. FERRELL: Well, if they were actually discharged by
18 Whole Foods in part because of some progressive disciplinary
19 attendance points or what have you they received for wearing
20 Black Lives Matter messaging while -- while working, then a
21 decision on whether that was actually protected activity
22 will -- will resolve that discipline issue as to whether the
23 law -- the discipline was lawfully administered or not.

24 Really, the only remaining issue is in the case of why
25 come Ms. Sarita Wilson, you didn't join us today, where the

1 allegation in the complaint was that she was constructively
2 discharged. And in fact, the record shows that she resigned
3 due to COVID. Or unlike the Charging Party next week that Ms.
4 Schaefer referenced where there's an allegation of constructive
5 discharge. But what you'll find out is she actually left one
6 Whole Foods store, moved to Hawaii and went to work for another
7 Whole Foods store with the same dress code policy.

8 But aside from cases about whether somebody was actually
9 constructively discharged or just resigned and moved to a
10 different store, aside from that issue -- those like we saw in
11 Region 1 for example, Your Honor, where people had -- you know,
12 they may have gotten -- they subject some discipline attendance
13 points or they were even discharged, where one or two of the
14 points in their progressive discipline that led to discharge
15 came from their refusal to work in dress code. That's going to
16 be resolved by the decision on whether that was protected
17 activity or not and whether the discipline was lawfully
18 administered or not.

19 JUDGE SOTOLONGO: Is that all right, Mr. Peterson?

20 MR. PETERSON: Yeah, thank you, Your Honor. And yes, I --
21 I'm -- I'm happy that you'll be reviewing the briefs carefully.
22 But I think you pointed out, you know, a -- a number of -- of
23 the issues.

24 Severing the cases, for one, does not save -- I guess it
25 would save some time if we did move up the -- the San Francisco

1 version of the hearing. But that portion of time is very
2 small. As we've been doing the hearing, we've seen -- you
3 know, we've been getting progressively quicker as to -- as to
4 going through the witness testimony.

5 There's also been a -- a degree of variances I pointed
6 out. There's a lot of -- there's a lot of overlap in what the
7 employees were doing. But at different stores, they raised
8 different issues and in different manners, different ways of
9 connecting their wearing of Black Lives Matter to -- to the --
10 their concerns as employees. And it's a -- you know, it is
11 a -- it's a totality of circumstances test. Each store adds
12 additional color, additional flavor, and supports -- supports
13 the other cases. There -- there -- there's a combination of
14 independence, being different. You know, there were different
15 responses from -- from Respondent at different stores,
16 different activities at the different stores. There's also
17 a -- a good amount of overlap there. So each -- the testimony
18 from each case kind of supports each of the other cases.

19 The -- the -- the -- the insignificant -- I mean
20 relatively insignificant savings of -- of a couple weeks if we
21 do move up the schedule pales in comparison to the potential
22 for -- for -- you know, for -- for prejudice of -- of both
23 the -- the cases that we've already tried losing out on
24 additional evidence from these additional cases and the -- you
25 know, the greater prejudices to those that have to wait

1 until -- not even be heard. The -- the -- the length of time
2 has already been significant. Adding additional years to -- to
3 that will cause, you know, memories to fade. It should --
4 should those cases need to be litigated. I understand Mr.
5 Ferrell's point that he believes they would likely be resolved
6 depending on the ultimate rulings in this case. But there's no
7 assurance of that. And -- and it's -- it's not -- it doesn't
8 promote judicial economy to -- to -- to much of a degree at all
9 to -- to -- to sever out these cases.

10 I -- I -- I understand the -- everyone and I share the --
11 the frustration about, you know, witnesses not being available
12 or -- or being, you know, unable to travel. But that is -- you
13 know, that is -- you know, that's an issue that comes up in
14 cases all the time. The -- the General Counsel typically does
15 not subpoena named discriminatees and -- and -- and we -- we
16 didn't in this case. And -- and -- yeah. And unfortunately,
17 again, the -- the efforts to get employees to these locations
18 have -- have failed. But -- and hopefully by tomorrow we'll
19 have confirmation that the -- the remaining witnesses are --
20 are -- will be available and will be ready to proceed as -- as
21 planned. The -- the saving --

22 JUDGE SOTOLONGO: I -- let -- let me -- I -- I expect --
23 Mr. -- Mr. Peterson, I'm -- I'm going to say this on the record
24 now. I expect to have information by close of business
25 tomorrow. You can send me an email with -- copy the other

1 parties. But I want to know -- I want to know if your
2 witnesses are going to be available to testify in Seattle and
3 or -- or -- or San Francisco, as the case may be. And I want
4 to know that by tomorrow evening. There's no reason at this
5 point, this late in the game that we didn't turn out
6 information. If one or more witnesses are not going to be
7 available, I want to know so. But also tell us in fact you
8 have other witnesses.

9 So if you have, you know, let's say five witnesses in --
10 in Seattle and one is not going to show up, fine. We still
11 have four we can put on the stand. But I'm not going to have
12 this situation like we just had now where your whole case --
13 all your witnesses are not -- unavailable and we have to
14 scramble to -- to find the solution to that. I want to have
15 the information by close of business tomorrow.

16 Now, let me ask you this. So is -- is it correct, as --
17 as Ms. Schaefer suggested, that General Counsel -- excuse me --
18 that General Counsel did not subpoena the two witnesses that
19 were scheduled to testify in Washington, DC?

20 MR. PETERSON: No, the General Counsel did -- did not
21 subpoena those witnesses. The General Counsel does not have a
22 practice of subpoenaing what are deemed friendly witnesses,
23 particularly named discriminatees, unless there's a special
24 circumstance, like they need it to get out of work or -- or --
25 or something like that. And again, this -- yeah. So we -- we

1 have not -- we have not. I can -- I can run that up the -- up
2 the chain. I -- I don't know that that would help anything.

3 JUDGE SOTOLONGO: So I -- I assume the General Counsel
4 is -- hasn't proffered to -- to pay their travel expenses to
5 Washington, DC?

6 MR. PETERSON: When -- yeah. So once -- once last week
7 when I learned there were financial concerns, I did -- I did --
8 I did inquire. And that does not appear to be -- at least
9 before today, it did not appear to be a viable -- a viable
10 option.

11 MS. SCHAEFER: Your -- Your Honor, I just want to point
12 out, Whole Foods is spending money too here. I -- I realize
13 that we're so -- I -- I -- I recognize the -- the point
14 meant -- Mr. Peterson is trying to make. But our client has
15 spent a significant amount of money litigating this case. It
16 has been investigated for two years. The General Counsel's sat
17 on this investigation for as long as it did, then issued
18 complaint once these employees traveled everywhere. Whole
19 Foods is expending a significant amount of money to respond to
20 this.

21 And so I just want -- want that on the record that this is
22 not a one sided thing where only one group is -- is refusing to
23 spend any money essentially to have their witnesses fly. We
24 have people flying all over the country and -- to -- to be at
25 these hearings. And yes, have booked tickets to Philadelphia,

1 Boston, DC Mr. Brown is in Atlanta today. So -- so this is --
2 I'm sorry. I just -- Mr. Peterson has --

3 JUDGE SOTOLONGO: (Indiscernible, simultaneous speech) --

4 MS. SCHAEFER: -- a problem flying two witnesses to DC I
5 want it to be clear that Whole Foods has been doing this the
6 entire time.

7 JUDGE SOTOLONGO: All right. I -- I'm very much aware of
8 that, Ms. Schaefer. I -- I have -- I haven't failed to notice
9 that you have five attorneys present at most of the hearings.
10 That -- that's -- that there involved a lot of cost right
11 there.

12 But in any event, let me say this. I will make my ruling
13 regarding next week's hearing -- I -- I'll just say this. It
14 doesn't look that we're going to be traveling to Washington, DC
15 because the General Counsel isn't going to have any witnesses.

16 I'm not sure that Respondent -- I mean, let me ask you
17 this. Are you -- are you -- in --

18 MS. SCHAEFER: We --

19 JUDGE SOTOLONGO: -- the absence of General Counsel's
20 witnesses, if we were to travel to DC, is Respondent ready or
21 willing or even would it be necessary for Respondent to put its
22 witnesses on?

23 MR. BROWN: No. If -- if -- if there's no -- if there's
24 no witness presented by Counsel for the General Counsel in DC,
25 we -- we have no intention of putting any witnesses on.

1 JUDGE SOTOLONGO: All right. In -- in light of that
2 answer, then I -- I will inform you right now. We're not going
3 to be going to DC next week. There's no point.

4 So the only issue before me, then, is whether I'm going to
5 grant the Charging Party's motion to hear the testimony of
6 these witnesses and, by extension, the Respondent's witnesses
7 virtually. And you know, assuming that -- that I do that --
8 and I'm not -- I'm not saying that I will -- that may not take
9 place next week. We may have to come up with a different week
10 for that because now time is short and -- and so -- to make the
11 arrangements. So I'm not sure that we're going to do --

12 MS. SCHAEFER: Your Honor, can I -- I'm sorry. I'm not
13 sure Mr. Brown -- correct me -- I'm sorry. Again, we're in two
14 different places. But I -- just to be clear, if Matt -- if --
15 if Mr. Peterson is not calling any witnesses for the DC por --
16 like, any witness in support of the DC charges, we will not be
17 calling any rebuttal witnesses.

18 If, however, you are in -- considering granting this
19 motion to have these two witnesses testify remotely, then Whole
20 Foods' position is that yes, Your Honor, we should all be in DC
21 and that we would do this the way that we did it pre-COVID,
22 pre-Zoom, where a witness would testify on the video
23 conferencing equipment that every Region has, that they would
24 testify while we were all in the room together. Then, when
25 they were at the conclusion of -- of, for example, Ms.

1 Christie's testimony, the Zoom -- the -- the video
2 teleconferencing would be put away and we would continue and
3 you would hear from our witnesses in person. That's --

4 JUDGE SOTOLONGO: That -- that -- that --

5 MS. SCHAEFER: -- what --

6 JUDGE SOTOLONGO: Well, that -- that is a valid point, Ms.
7 Schaefer. Let me -- let me -- let me ask you this. Let me ask
8 you this. Because, you know, arguments have been raised, not
9 necessarily by you, but people have said that to have -- to
10 have some witnesses virtually while at the same time having
11 some witnesses in-person places the party whose witnesses are
12 being examined in person at a disadvantage because there's
13 arguments to the fact that, obviously cross-examination in
14 person is easier or at least more effective than cross-
15 examination virtually. In other words, there is some room for
16 the argument that you, Respondent, would be placed at a
17 disadvantage because General Counsel gets to cross-examine your
18 witness in-person there in Washington, DC while you are going
19 to be cross examining the General Counsel's witness virtually,
20 whatever that may be. And it's -- it's Seattle or Washington
21 or Honolulu or whatever that may be. So --

22 MR. BROWN: Your Honor, our -- our position is that we do
23 not believe that having multiple witnesses testify virtually is
24 efficient and effective. It -- we -- we would like -- we -- we
25 acknowledge what you're -- what you're suggesting and saying.

1 But it is our preference to have our witnesses testify live in
2 front of you.

3 JUDGE SOTOLONGO: Okay. I -- I -- okay. So understood.
4 I just wanted to make sure that (audio interference) and I
5 wanted to objections later on that we're being placed at a
6 disadvantage because, you know, we are -- our witnesses are
7 being cross-examined in -- in-person while we get --

8 MR. BROWN: No, Your Honor. Our -- our position is that
9 everybody, including Counsel and yourself, should be in -- in
10 the courtroom next week and that only the witnesses, if you're
11 inclined to do this at all and we hope you -- you're not -- but
12 if you're inclined to do so, that they appear as Ms. Schaefer
13 proposed.

14 JUDGE SOTOLONGO: Okay. Understood. So let -- then that
15 raises the next question again, Mr. Peterson. First of all,
16 have you -- number 1, have you secured a hearing room, a
17 facility in Washington, DC where our proceeding is going to
18 take -- I -- I hope you have by this point. And where was --
19 where were the -- what was the hearing schedule? Because I
20 have no idea.

21 MR. PETERSON: Yes, we do have it secured. I can't recall
22 if it's -- if we are doing it in the Board hearing room or in
23 the -- the -- the subregion. I can -- I can -- I can send an
24 email to the parties afterwards with the -- with the -- with
25 the location. I would need to, obviously, make sure that

1 potentially -- obviously, this is all kind of contingent on --
2 on a ruling. But that there -- that -- that there is video
3 conference equipment available. I know that -- I don't believe
4 the DC office is going through any moves or anything right now.
5 But that has been a problem throughout the -- the agency.

6 I should also just note along the lines of if for whatever
7 reason this -- the hearing, you know, does go forward -- if --
8 if the hearing goes forward and the witnesses aren't allowed to
9 testify, I just recently received subpoena production from --
10 from Whole Foods that I'm -- so if -- if the witnesses aren't
11 allowed to testify, there may be the potential for a similar
12 exhibit to be offered as -- as it was today. I'm hoping that
13 the witnesses are allowed to testify.

14 And anyways, yes. So there is -- there is --

15 JUDGE SOTOLONGO: (Indiscernible) again, now the
16 Respondent has just indicated that in the absence of witnesses
17 testifying in the DC proceedings, either virtually or in-
18 person, that they have no intention of producing any rebuttal
19 witnesses.

20 MR. PETERSON: Right.

21 JUDGE SOTOLONGO: You're now saying -- you're now saying
22 that you might, like you did today, introduce some -- some --
23 some documentary evidence into the record?

24 MR. PETERSON: Yes. I have not -- I have not -- I have
25 not fully reviewed Respondent's production for the DC area. So

1 there is a possibility that there will be a similar -- you
2 know, if -- if we're unable to make our proof through
3 witnesses, that there may be -- I have not -- I have not yet
4 had a chance to fully review the production. It was only
5 received recently.

6 So I -- I -- yes. I want to put up -- I -- I know that
7 there's a lot of moving parts. There's a lot of logistics
8 here. I can -- I -- I can -- I can -- again, this is kind of
9 contingent on your -- on your ruling. But I -- I guess in --
10 in light of awaiting that, I can -- I can -- by tomorrow I can
11 have -- I can have -- I can send the parties an email if -- if
12 that's -- if that is --

13 JUDGE SOTOLONGO: Okay. Well, okay. The first thing
14 before I make my final ruling, you need to find that out -- we
15 need to find out pronto -- I mean, today if po -- whether,
16 number 1, we have virtual capacity in the hearing room.
17 Because if I were to -- to approve this, I will go ahead with
18 what Ms. Schaefer suggested, which means that we would have to
19 be all in-person in DC and hear the testimony of your witnesses
20 virtually, and Respondent's witnesses then would testify in-
21 person. That's the only way I'm going to proceed. I'm not
22 going to do this virtually. I can tell you right now -- all
23 virtually. We're either going to be in DC and hear the -- the
24 testimony of your witnesses virtually and theirs in person or
25 we're not going to be in DC whatsoever. And I'll make my

1 ruling according. But one thing I need to know, and I need to
2 know by close of business today, is whether we have the video
3 capacity in DC to -- to put on the testimony of these
4 witnesses. That's number 1. And I need to know this pronto.
5 Number 1.

6 And number 2, we need to take into account the time zones.
7 If one witness is going to be in Honolulu and we're going to be
8 in Washington DC, that's a six hour time difference. Okay. So
9 we need to take that into account. And the person, of course,
10 on the west coast is going to be in three-hour time difference.
11 So we need to take that into account. We can't have a witness
12 testifying at, you know, 6:00 in the morning their time. That
13 just -- it's unreasonable. And so we're going to have to
14 figure out how we deal with that.

15 Now, I'm not saying that that's the way I'm going to rule.
16 I'm just exploring possibilities here because I -- I -- I think
17 at this point, you know, we -- we're going to be there in
18 person or we're not going to be there at all. So again, the --
19 the -- the rules regarding -- the rules regarding extenuating
20 or -- or compelling circumstances for virtual hearings have to
21 do with the pandemic and nothing else. No other convenience of
22 witnesses and certainly not the convenience of the Charging
23 Party. But so the rules are the rules. The rules are still
24 called for in my personal hearings unless there's compelling
25 circumstances to -- to the contrary.

1 So I need to know. And I need to know as soon as possible
2 what virtual capacity we're going to have in -- in -- in
3 Washington DC And if I -- we go ahead, we may have to start at
4 a later hour, not 9:00 in the morning because that would be
5 6:00 in the morning, you know, west coast time and -- and 3:00
6 in the morning Honolulu time. So there's no way those
7 witnesses are going to be testifying at that time. And I
8 assume you're going to -- your witnesses are going to go first
9 if we decide to do that. So we have to figure that out.

10 MR. PETERSON: Yes.

11 JUDGE SOTOLONGO: And if so, then how long -- how long do
12 you expect -- how long do you expect your witnesses' testimony
13 on direct to last?

14 MR. PETERSON: Direct, I would say one, one and a half
15 hours give or take --

16 JUDGE SOTOLONGO: Each?

17 MR. PETERSON: -- a half an hour. Yes.

18 JUDGE SOTOLONGO: Each?

19 MR. PETERSON: Yes.

20 JUDGE SOTOLONGO: Okay. I need to know by the end of --
21 close of busi -- I know it is now noon. Or -- or actually,
22 11:40 our -- west coast time. It is obviously 2:40 in the east
23 coast. I need to find out by the close of business today, Mr.
24 Peterson, whether we have the capacity -- video capacity in DC
25 That's going to point to my decision, quite frankly.

1 And -- and -- and even if we do, I'm not saying -- I need
2 to -- I need to really think about this. I'm not saying I'm
3 going to go ahead and -- and grant that motion because I'm very
4 disturbed by the 11th hour occurrence in -- in these events
5 here. But I -- I have a -- I have agreed with Respondent's
6 decision that if we do it in DC, that we're going to do it that
7 way. And in other words, their witnesses are going to testify
8 live, your witnesses are going to testify virtually, and we're
9 going to be all in the same room. And --

10 MR. PETERSON: I understand, Your Honor.

11 JUDGE SOTOLONGO: -- (indiscernible, simultaneous
12 speech) -- excuse me?

13 MR. PETERSON: Oh, I said yeah. I'm sorry, I didn't mean
14 to interrupt. I was just saying I understand and I'll reach
15 out to -- to our -- our DC counterparts as -- as soon --

16 JUDGE SOTOLONGO: All right. So by close of business
17 today or I would say 9:00 in the morning west coast time
18 tomorrow morning. So that'd be noon tomorrow at the latest.
19 At the absolute -- I need a definite answer. Talk to the IT
20 people. Talk to whoever you need to talk to. Obviously your
21 witnesses.

22 You need to -- to make sure that they're on board and
23 they're going to be ready and willing to testify in front of
24 either the Honolulu office or the Seattle office or whatever.
25 Because that's another complication. I -- I -- I'm not going

1 to have somebody holding up their phone and testifying. That's
2 just not going to work. They're not going to be able to review
3 any -- any -- any -- it's going to be very difficult for them
4 to review any -- any -- any documents or exhibits. So -- so
5 they're either going to be in a room at the regional office
6 or -- or somewhere else where they have -- with a laptop,
7 somewhere they have full capacity to -- to -- to see and be
8 seen. A phone is not going to be an acceptable solution for
9 me.

10 So I need to know -- have an answer by first thing
11 tomorrow morning. Preferably close of business today. And you
12 know, I know you're -- that's -- you're only three hours away
13 from close of business in -- in Washington -- two hours away.
14 So you need to get on the ball.

15 MR. PETERSON: And just to understand, Your Honor, the --
16 obviously, you haven't made your ruling yet. But the -- the --
17 the priority would be the having access to a computer. The
18 location from where they testify is -- is -- is not -- that's
19 not a factor in --

20 JUDGE SOTOLONGO: Well --

21 MR. PETERSON: They wouldn't have to --

22 JUDGE SOTOLONGO: -- obviously the -- I mean, because of
23 the -- because of the technical capabilities, I would -- I
24 would think that the regional office would be the preferable
25 location. But obviously, do we have an -- we have a

1 subregional office in Honolulu.

2 MR. PETERSON: They're moving. Yeah. So I mentioned
3 earlier that the -- that there's not -- they don't have --
4 they're -- they're in the process of moving. They don't have
5 their smartboard. And it didn't sound like there was any
6 laptop available. The Se -- the Seattle office, again, they
7 also don't have -- apparently don't have the -- the smartboard
8 functioning. I'm not sure exactly why. And like I said, the
9 regional attorney had considered loaning -- loaning -- loaning
10 her laptop for that purpose.

11 But I will work on that -- work on that as soon as we get
12 off here. I'm -- I'm -- I'm thinking yeah, it could be -- it
13 could be possible that the witness -- if the witnesses are able
14 to find a friend or family member with a -- with a laptop or a
15 computer that that might --

16 JUDGE SOTOLONGO: Well, that will -- we're going to need a
17 reliable Wi-Fi --

18 MR. PETERSON: Yeah.

19 JUDGE SOTOLONGO: -- a Wi-Fi or -- or -- or hardwired, you
20 know, internet capability. Because, you know, we don't want
21 any spotty reception here.

22 MR. PETERSON: Understood.

23 JUDGE SOTOLONGO: I think it's difficult enough as it is
24 with virtual hearings.

25 MR. PETERSON: Understood and agreed.



1 JUDGE SOTOLONGO: So I need to be informed first thing
2 tomorrow mor -- or by close of business today preferably or by
3 first thing tomorrow morning what capability and where would
4 this -- are you suggesting that this witness would be
5 testifying. And -- and hopefully you'll have an answer by me
6 in order for me to either -- either approving such arrangements
7 or -- and specify, be specific. Communicate to -- through us
8 via email. Be specific. And I will address in my order, which
9 hopefully will go out by close of business tomorrow, one way or
10 the other. But -- but you know, I'm very troubled by all of
11 this to -- to again repeat myself.

12 MR. PETERSON: Understood, Your Honor.

13 JUDGE SOTOLONGO: Anything further?

14 MR. PETERSON: Not from the General Counsel.

15 MR. BROWN: No, Your Honor.

16 JUDGE SOTOLONGO: All right. And as far as the -- the
17 severance motion, Mr. Ferrell, parties, I -- depending what
18 happens, whether we travel to DC next week or not, I hope to
19 have a ruling I would say by -- by midweek. Obviously, if we
20 travel to DC, I'm not going to be severing the DC portion
21 obviously. But I think that's -- that's sort of a longshot at
22 this point. The severance will be for post-DC proceedings.

23 MR. BROWN: Understood, your Honor.

24 JUDGE SOTOLONGO: So and I'll take that into
25 consideration. Again, I need to -- to digest all your

1 arguments in that regard.

2 All right. Again, let's -- so we'll be closing today.

3 And -- and I expect to -- to hear from you, Mr. Peterson, and
4 copies all the parties by -- by no later than 9 a.m. Pacific
5 time tomorrow morning.

6 MR. PETERSON: Yes, Your Honor.

7 JUDGE SOTOLONGO: All right. Thank you. All right.

8 The -- the hearing -- we're off the record. The hearing --
9 this portion of the hearing is hereby closed.

10 **(Whereupon, the hearing in the above-entitled matter was closed**
11 **at 11:46 a.m.)**

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C E R T I F I C A T I O N

This is to certify that the attached proceedings, via Zoom Videoconference, before the National Labor Relations Board (NLRB), Region 20, Case Numbers 01-CA-263079, et al., Whole Foods Market Services, Inc. and Savannah Lynn Kinzer, Suverino Frith, Leea Mary Kelly, Ana Belen Del Rio Ramirez, Camille Tucker-Tolbert, Truman Read, Abdulai Barry, Haley Ashley Evans, Cassidy Visco, Justine O'Neill, Sarita Wilson, Lyla Marcella Styles, Yuri London, Shannon Liss-Riordan, Christopher Michno, Kirby Burt, and Kaeleb Rae Candrill, As Individuals, held at the National Labor Relations Board, Region 20, 450 Golden Gate Avenue, Suite 3112, San Francisco, CA 94102, on July 14, 2022, at 8:43 a.m. was held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.



TROY A. RAY

Official Reporter

